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REPORT
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ALABAMA
DURING THE
SPECIAL TERM, 1914

BY
LAWRENCE H. LEE

Reporter of Decisions.

VOL. 188.

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2nd Circuit-----	HON. A. E. GAMBLE-----	Greenville.
3rd Circuit-----	HON. MIKE SOLLIE-----	Ozark.
4th Circuit-----	HON. B. M. MILLER-----	Camden.
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16th Circuit-----	HON. J. E. BLACKWOOD-----	Gadsden.

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IN THIS VOLUME WERE HEARD.**

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SUPERNUMERARY JUDGE.

HON. A. H. ALSTON-----	Clayton.
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DURING THE TIME THE CASES REPORTED IN
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ERRATA.

Page 141, 2nd headnote, for § 5475, read 5415.

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CASES

IN THE

SUPREME COURT OF ALABAMA

SPECIAL TERMS 1914.

Ex Parte Fletcher, in re Fletcher v. The State.

Violating Prohibition Law.

(Decided July 25, 1914. 66 South. 148.)

Intoxicating Liquors; Jury Trial; Statute; Presumption.—Where defendant wrote on his appearance bond, "I, Shell Fletcher, defendant in this case, prefer a jury, Sept. 8, 1913," the statement was a substantial compliance with the requirement of Acts 1909, p. 63, for a demand for a jury; it being presumed that the sheriff duly returned the bond to the clerk as required by section 6291, Code 1907, so that the demand for a jury was filed with the bond.

CERTIORARI to Court of Appeals.

Petition of Shell Fletcher for certiorari to the Court of Appeals to review and revise the judgment and decision of that court in the case of *Shell Fletcher v. State*, 11 Ala. App. 180, 65 South, 683. Writ granted and judgment of the Court of Appeals reversed and the cause remanded.

PARKS & PRESTWOOD, for appellant. The provisions of the Fuller bill, and the provisions of the act creating the court in which this cause was tried are in direct conflict, and the former must prevail.—109 U. S. 504; 22 Mich. 322; Endlich on Interpretation, § 216. The endorsement on the bail bond was a sufficient demand and

[Ex Parte Fletcher in re. Fletcher v. The State.]

a sufficient filing.—*Freeman v. Bridges*, 123 Ala. 287; 6 Words & Phrases, 5498; 102 Ga. 506. Under section 6291, Code 1907, the sheriff was bound to return the bail bond and under section 3272, the clerk was bound to file it.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. For brief see the report of this case in 11 Ala. App. 180, 65 South. 683.

PER CURIAM.—We may concede, without deciding, that section 32 of the act of 1907, special session, page 63, was not repealed by the local act of 1911, page 315, and that the defendant had to demand a jury as there provided, yet we are of the opinion that the defendant substantially complied with this requirement.—*Freeman v. Bridges*, 123 Ala. 287, 26 South. 512. It is true that it affirmatively appeared in the case *supra* that the bond upon which the demand was made was returned and filed with the clerk, but section 6291 of the Code of 1907 required the sheriff to return the bond in question to the clerk, and, this being a ministerial act, the law presumes that the sheriff discharged his duty.—*Guesnard v. L. & N. R. R. Co.*, 76 Ala. 453; *Smith v. State*, 88 Ala. 73, 7 South. 52; Mechem on Public Officers, § 579. The Court of Appeals erred in holding that the defendant did not show a legal demand for a jury, and was therefore not entitled to one in the trial court, and the judgment of affirmance is reversed, and the cause is remanded to the Court of Appeals.

Reversed and remanded.

[*Ex Parte Pappenburg in re. Pappenburg v. The State.*]

Ex Parte Pappenburg, in re Pappenburg v. The State.

Violating Prohibition Law.

(Decided June 3, 1914. 66 South. 32.)

CERTIORARI to Court of Appeals.

Petition of Henry Pappenburg for certiorari to the Court of Appeals, to review and revise the judgment of said court in the case of *Henry Pappenburg v. State*, 10 Ala. App. 224, 65 South. 418, wherein said court affirms the judgment of the trial court convicting petitioner for transporting prohibited liquors, in violation of section 24 of the Fuller bill. Writ denied.

TIDWELL & SAMPLE, for petitioner. See brief filed in the cause as reported in 10 Ala. App. 224, 65 South. 418.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. See brief filed in the cause as reported in 10 Ala. App. 224, 65 South 418.

MAYFIELD, J.—All the Justices except the writer are of the opinion that the application for certiorari should be denied on the authority of the opinion of the Court of Appeals, rendered in this case, and such is the order of this court.

The writer, however, is of the opinion that the application ought to be granted, and the judgment and decision of the Court of Appeals reversed; and the opinion following expresses only his own views of the law upon the subject.

[Ex Parte Pappenburg in re. Pappenburg v. The State.]

Certiorari denied.

MAYFIELD, J.—(dissenting).—The sole question for decision on this record is whether or not the Tennessee river is a “public highway” within the meaning of that phrase as used in section 24 of the “Fuller Bill” (Acts 1909, p. 63). That section reads as follows: “It shall be unlawful for any person, firm, corporation or association, whether a common carrier or not, to accept from another for shipment, transportation or delivery, or to ship, transport or deliver for another said prohibited liquors or beverages or any of them, when received at one point, place or locality in this state to be shipped or transported to or delivered to another person, firm or corporation at another point, place or locality in this state, or to convey or transport over along any public street or highway any of such prohibited liquors for another, and any person violating any provision of this section shall be guilty of a misdemeanor, but the provisions of this section shall not apply to those transporting and delivering to druggists and physicians such alcohol as they are permitted by the laws of the state to sell or dispose of in accordance with the statutory regulations upon that subject.”

The defendant was charged and convicted under the following affidavit: “State of Alabama, Morgan County: Morgan County Law and Equity Court. Before me, Thos. W. Wert, judge of the Morgan county law and equity court in and for said county, personally appeared Jephtha V. May, who, being duly sworn, deposes and says that he has probable cause for believing and does believe that within twelve months before making this affidavit, and in said county, Henry Papenburg did convey or transport over or along a public highway, to wit, the Tennessee river, prohibited liquors, to wit, beer, for

[Ex Parte Pappenburg in re. Pappenburg v. The State.]

one R. C. Leib, against the peace and dignity of the state of Alabama. Jephtha V. May.

"Sworn to and subscribed before me this the 6th day of Sept., 1913.

"Thos. W. Wert.

"Judge of the Morgan County Law and Equity Court."

The sufficiency of this affidavit to support a conviction was tested by demurrer, and by motion in arrest of judgment; the insistence of the accused being that the Tennessee river was not a "public highway" within the meaning of that phrase as used in section 24 of the act above quoted, which made it a criminal offense to carry or transport prohibited liquors along, across, or over "any public street or highway." The trial court ruled this point against the accused, and he appealed to the Court of Appeals, and that court ruled the point against him, and he applies to this court to revise the decision of the Court of Appeals.

There can be no doubt that the Tennessee river is a public highway for some purposes, and this is not denied, but is conceded, by counsel for the petitioner. But is it a highway within the meaning of that word as used in section 24 of the act quoted? That is to say, did the Legislature, in using the phrase "any public street or highway" intend to include rivers like the Tennessee, which are navigable, and, for some purposes, are undoubtedly "public highways?" It is our duty to give approval to the legislative will, if we can ascertain that will from the language used in the statute.

The word "highway" and the phrase "public highway" have each been the subject of judicial construction when used in criminal and penal statutes like the one in question. The case of *Comer v. State*, 62 Ala. 320, is one of those cases, and it was there said: "Every

[Ex Parte Pappenburg in re. Pappenburg v. The State.]

thoroughfare which is used by the public, and which is, in the language of the English books, 'common to all the king's subjects,' is a highway, whether it be a carriageway, a horseway, a footway, or a navigable river."

In *Glass v. State*, 30 Ala. 529, it was said: "It must be conceded that, under the existing laws of the United States and of this state, the navigable rivers within this state are public highways for certain purposes; but it does not follow that they are so for all purposes. [*Bullock v. Wilson*], 2 Port. 436; [*Morgan v. Reading*], 3 Smedes & M. [Miss.] 366."

In *Mills v. State*, 20 Ala. 86, a highway, within the meaning of the statute then of force against gaming, was defined to be: "A public road; that is, a road dedicated to and kept up by the public, as contradistinguished from private ways or neighborhood roads, which are not so kept up."

This case has been followed and expressly reaffirmed in *Napier v. State*, 51 Ala. 171, *Dickey v. State*, 68 Ala. 509, and *Graham v. State*, 105 Ala. 132, 16 South. 934, holding that a navigable river was not a public highway within the meaning of the statutes which prohibited gaming on a "highway." The *Glass Case*, *supra*, followed the opinion and decision in *Mills' Case*, *supra*, to the effect that, while navigable rivers were public highways for some purposes, they were not highways within the meaning of statutes like the one in question.

There is also a rule of construction which tends to show that "highway" as used in the statute quoted was not used in its general and broad sense, but in a restricted sense. The word "highway" as used in the statute follows the word "street," and in such cases it is construed to be used in the restricted sense.

Mr. Endlich, in his work on Interpretation of Statutes, states the rule to be that where a general word fol-

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lows particular and specific words of the same nature as itself, which is the case here, the general word takes its meaning from the particular preceding words of the same nature, and is presumed to be restricted to the same sense as those words; that is, the general word is then presumed to comprehend only things of the same kind as those designated by the specific words, unless there be something to show a wider sense was intended, and he illustrates the rule by the following examples: "The Sunday Act (St. 29 Car. 2, c. 7), which enacts that 'no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any labor, business, or work of their ordinary callings upon the Lord's Day,' has been held not to include a coach proprietor or a farmer, or, no doubt, an attorney; the word 'person' being confined to those callings like those specified by the preceding words. * * * An act which made it a felony to break and enter into a 'dwelling, shop, warehouse, or countinghouse' would not include a workshop, but only that kind of shop which had some analogy with a warehouse; that is, one for the sale of goods. In an act imposing a penalty on unqualified persons navigating 'any wherry, lighter, or other craft,' the last word would include only vessels of the same kind as wherries and lighters, not steam tugs which carried neither passengers nor goods. * * * The St. 11 Geo. 2, c. 19, which authorizes the distress for rent of 'corn, grass, or other product' growing on the demised lands, includes only products similar to grass and corn; but not young trees, which, though unquestionably products of the land, are of a different character from the products specified by the earlier terms. For the same reason, young trees are not included in the act which punishes the stealing of 'any plant, root, fruit, or vegetable production growing in a garden, orchard, nursery ground,

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hot-house or conservatory.”—Endlich, Int. Stat. 568-570.

Mr. Sutherland, in his work on Statutory Construction, announces the same rule. He gives the following examples: “It was held that a bull was not included under the words ‘or other cattle’ as used in a statute which made it indictable for any person to wantonly or cruelly beat, abuse, and ill treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle. Bayley, J., said: ‘Horse, mare, gelding, are one class; ox, cow, heifer, and steer are another; and in my opinion the bull is not included in this act.’ * * * A Michigan statute gave every wife, child, parents, guardian, husband or other person’ a right of action against a liquor seller for injury done to the plaintiff by reason of the intoxication of any person. On the ground and principle under consideration, it was held that the intoxicated person himself was not within the statute.”—2 Lewis’ Sutherland, Stat. Con. 816-818.

There is another rule of construction in this connection which tends to show that “highway” as used in this statute does not include the Tennessee river. That rule is that general words following particular words, as “highway” following “streets,” will not be held to include any of a superior class to that to which the particular words belong.

An English statute forbade salmon fishing in the waters of certain enumerated streams and “all other waters from which salmon are taken”; and this was held to include only rivers inferior to those enumerated.

These rules, however, are but rules of construction, intended only as aids to the court in ascertaining the meaning intended by the Legislature, and not to defeat that will by giving the words a more restricted meaning than the Legislature intended. The doctrine of *ejusdem*

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generis must not be carried to the extreme of depriving general terms of all meaning or scope for operation and effect. If the intention of the Legislature is apparent, then there is no room for rules of construction; they would tend to confuse rather than aid.—*Foster v. Blount*, 18 Ala. 687.

We think, however, that the doctrine of ejusdem generis does aid and apply in this case, and shows that the Tennessee river or other navigable waterways were not included within the meaning of the word "highway" as used in the section of the act in question. In fact, to hold that such rivers are included would render useless other provisions of the act as to common carriers. To restrict the words, as contended by the petitioner, would give effect to all parts of the act; but to include within them the navigable rivers, railroads, and all highways would make other parts of the act useless.

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Murder.

(Decided June 11, 1914. 65 South. 972.)

1. *Homicide; Evidence; Motive.*—Evidence that defendant had procured insurance upon the life of his wife, payable to himself in the sum of \$17,000.00, was admissible as tending to show motive, the prosecution being for wife murder.

2. *Same.*—Where the state claimed that defendant killed his wife in order to collect insurance on her life, the details of the procuring and collecting the insurance, and conversations relative thereto not tending to show guilt or innocence, nor to corroborate or contradict any relevant evidence, is inadmissible.

3. *Same.*—Where it did appear that defendant said that he would fix up his house with the insurance money, it was not competent to introduce statements made by defendant subsequent to the killing of his wife relative to what he would do as to fixing up his house.

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4. *Same; Relations Between Defendant and Deceased.*—Where a defendant was charged with killing his wife, evidence as to actual cruelty on the part of defendant towards his wife is admissible.

5. *Same.*—Where defendant was charged with killing his wife, evidence as to his association and relation with other women, or even the desire of such relation, is admissible, if it appears that the wife stood in the way of his gratifying these desires; but words and acts to or towards other women are not admissible, unless they have a certain tendency to show motive.

6. *Same.*—Relations between defendant and other women are not admissible for the purpose of proving the corpus delicti, the charge being wife murder, but are admissible only where there is other evidence to establish the corpus delicti to repel the presumption of innocence arising from the relationship existing between man and wife.

7. *Same.*—Where defendant was being tried for murder of his wife evidence that on one occasion, defendant said to a witness who was walking into church with a young lady unknown to defendant, that if his wife was not there he would take the girl away from the witness; that he advised another witness not to get married, and said that he would not marry any woman the sun ever shone upon; that on another occasion he said, in a laughing way, that if he was not married he would not be, was not admissible in the absence of evidence of a direct nature, to show infelicity between defendant and his wife, or that he was cruel and unkind to her.

8. *Same; Statements by Deceased.*—Evidence as to a statement made by deceased after she had received a mortal wound, which was not a part of the res gestæ of the killing, nor of a dying declaration admitted in evidence, and which did not tend to contradict the dying declarations, was not admissible.

9. *Same; Threats by Third Person.*—Where defendant was on trial for wife murder, and there was evidence tending to show that the wife was shot by a negro boy, and that such boy intended to shoot defendant instead, it was competent for defendant to introduce in evidence threats made by the negro boy towards him.

10. *Same.*—Where the state had introduced evidence tending to show intimate if not criminal relations between defendant and a young woman, and that they were together in an automobile and registered at various hotels, it was competent for defendant to introduce evidence that a brother of defendant and such young woman had had some trouble, and that defendant's brother had procured defendant to carry her away, and that he was doing so when they were seen together, but the details of the trouble between the brother and the young woman were not admissible.

11. *Same.*—Where the state asserted as a motive for the killing the obtaining by defendant of the insurance on the life of his wife, evidence that defendant made proof of his wife's death to the insurance company soon after the killing, was properly admitted.

12. *Same.*—The fact that defendant stated at the time that he was making such proof that he was in no hurry to do so, was properly excluded as a self-serving declaration.

13. *Same.*—The details of purchases and exchanges of automobiles by defendant soon after the death of his wife, and what was said

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relative to such exchanges and purchases, were not admissible, and was not rendered admissible by a remark of defendant that a particular machine was just right for carrying ladies to ride, or for carrying his children.

14. *Same*.—Where witness did not identify the accused as the man in question, and it was not shown to have had any connection with or relation to the death of the wife, the fact that a man of the same name as defendant was in the house of a certain woman, was improperly admitted.

15. *Same*.—Where defendant was on trial for murdering his wife, and the state had introduced letters written by defendant while in jail, stating that he expected to tell the truth if it broke his neck, defendant should have been permitted to show that at that time he was not charged with killing his wife, but with killing a third person who he had asserted was the murderer of the wife.

16. *Evidence; Motive*.—Motive is an inducement or that which leads or tempts the mind to do or commit the crime charged.

17. *Same*.—The motive for a crime cannot be speculated upon or imagined, and the motive attributed to defendant must have some legal or logical relation to the act charged according to known rules and principles of human conduct; otherwise, it cannot be considered a legitimate part of the proof.

18. *Same; Best and Secondary*.—The warrants and capias under which defendant was detained in jail at the time he wrote a certain letter, were the best evidence that he had not then been charged with or arrested for the killing of his wife, for whose murder he was then on trial, but that he was being charged with the murder of a third person.

19. *Appeal and Error; Harmless Error; Evidence*.—The fact that accused was permitted to testify to facts which other witnesses were called to prove did not render the exclusion of the testimony of such witness harmless to defendant, since a defendant cannot be compelled to testify, nor to prove his own defense by his evidence alone.

20. *Trial; Inspection of Papers*.—It was not error for the court to refuse to require the state's counsel to turn over to counsel for defendant a slip of paper in the possession of the state's counsel on which defendant had written his name, but which was not sought to be introduced in evidence.

21. *Charge of Court; Covered by Those Given*.—It is not error to refuse charges substantially covered by written charges given.

22. *Jury; Competency; Rejection by Court*.—Under Acts 1909, p. 306, the court cannot properly decline to place upon the lists the names of persons appearing as a part of the venire as to whom no statutory ground of disqualification exists, and who are not excused for some reason personal to the juror, such as sickness.

23. *Same*.—It was not error for the court to excuse of its own motion jurors who were opposed to capital punishment, or who had a fixed opinion.

24. *Same; Qualification; Reading English*.—Inability to read the English language does not disqualify the juror who is possessed of all

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the other qualifications prescribed, and is a freeholder or householder (Acts 1909, p. 305).

APPEAL from Covington Circuit Court.

Heard before Hon. A. H. ALSTON.

Sam Spicer, Jr., was convicted of the murder of his wife, sentenced to the penitentiary for life, and from such judgment he appeals. Reversed and remanded.

HENRY OPP and POWELL & ALBRITTON, for appellant. The court erred in excusing the jurors, for, notwithstanding their answers disclosed cause for challenge, the state may waive its right to challenge, and the court should not have excused them of its own motion.—*Bell v. State*, 115 Ala. 37; *Lyman v. State*, 45 Ala. 78; *Murphy v. State*, 37 Ala. 142; §§ 7276, and 7278, Code 1907. Neither of the Carters were disqualified as jurors.—§ 11, Acts 1909, p. 305. Counsel discuss the evidence relative to insurance policies and the statements connected therewith with the insistence that serious error intervened, and they cite 72 Pa. St. 60; 6 Enc. of Evid. 681-2; *Johnson v. State*, 17 Ala. 625; *Duncan v. State*, 34 Ala. *Liles v. State*, 30 Ala. 24; *Smith v. State*, 9 Ala. 990. These same authorities are cited in support of the contention that the court erred in admitting evidence as to defendant's relations with other women. They insist that the threats made by the negro boy against defendant were admissible in this case, and they cite 6 Enc. of Evid. 751; 30 S. W. 804; 10 Tex. App. 230; *Clark v. State*, 78 Ala. 474. The statement made by deceased was improperly admitted.—*Coles v. State*, 105 Ala. 76.

R. C. BRICKELL, Attorney General, W. L. MARTIN, Assistant Attorney General, and W. L. PARKS, for the State. No error attended the action of the court in excusing the juror.—*State v. Marshall*, 8 Ala. 302; *Tatum*

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v. Young, 1 Rep. 298; *Farriss v. State*, 85 Ala. 1; *Griffin v. State*, 596; *Breeden v. State*, 145 Ala. 1. Under the insistence of the state, testimony as to the insurance and as to defendant's relation with other women was properly admitted.—21 Cyc. 913 and cases cited; *McAdory v. State*, 62 Ala. 159; *Welch v. State*, 97 Ala. 2; *Duncan v. State*, 88 Ala. 34. There is no error in admitting the statement attributed to deceased.—*Shell v. State*, 88 Ala. 17, and authorities supra. Counsel discuss the refused charges, but without further citation of authority.

MAYFIELD, J.—Appellant was indicted, convicted, and sentenced to the penitentiary for life for the murder of his wife.

Deceased was shot with a shotgun, shortly after dark, and about the time she was finishing up her day's work. She had just about finished cleaning up her dining room after supper, and the other members of the family—her husband and two small children—were preparing to retire for the night. At the moment she was shot she was coming off a gallery or porch into one of the rooms. The person who did the shooting was just outside of the house and only a few feet—10 or 15—from the porch.

The deceased, in her dying declaration, described the circumstances of the shooting as follows, according to the testimony of the physician who attended her and dressed her wound: "Mrs. Spicer was suffering untold agony when I got there. She was lying there severely and dangerously wounded, and afterwards died from the effects of the wound. While she was there, right after I got there, she made a statement as to whether she was going to die, I guess you would consider it a statement. She said she was going to die and she was

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suffering a great deal. She said she couldn't live. She really didn't make her statement; she didn't do it in what you would say dying declaration, but did it in this way: In speaking of the shooting, she said it was so much better that the negro made a mistake in shooting her than it would have been if he had shot Mr. Spicer, because it would be so much better for her to be taken than him. He could take so much better care of the children than she. She said she couldn't live. She said the negro did the shooting. In a general way, she said the negro was named Joe Green; possibly she said just Joe. My recollection is she just spoke of the negro. Of course it was understood that the balance was known. She didn't say she was standing when she was shot; she said she was coming from the washpan shelf. She said Mr. Spicer was right where he said he was in the house by the fire. She just got up and walked to the washpan shelf; left him sitting there and started to walk back, when the gun was fired.

The witness was here again examined by the attorney for the state, and testified as follows:

"Mrs. Spicer did not tell me that she saw Joe Green shoot her." Being asked by the attorney for the state what Mrs. Spicer said about Joe Green's shooting her, the witness testified as follows:

"It is mighty hard to say; take an event like that, and it is mighty hard to remember remarks passed; but as I stated before, in her talk, understand her condition was about, all the time, from the moment I got there, I began to impress upon her the importance of being quiet, and I didn't let her talk when I could help it, but constantly she would break out, and I remember that distinctly, and she wept over that condition, and said it would be better for Sam to be left with the children than for him to have been taken. She didn't say

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she saw anybody shoot her. She said that she didn't see anybody. She said she didn't see who shot her."

The witness was here examined by the attorney for the defendant, and testified as follows: "She didn't say anything about seeing somebody out there at the well. I asked her positively if she saw anybody, and she said that she didn't.

The defendant's description of the shooting was, in substance, that he was preparing to retire for the night, had stepped out of the doors a few minutes before the shooting. He says, among other things: "I went in there and was just talking to my children like I always did. My wife was about her dishes and victuals while I was out, and she was just making preparations to come in when I went in and set down and pulled off my shoes. When I pulled off my shoes, I went and got some water and washed my feet. I washed my feet in the house, by the fire in the bedroom. The children were in there with us, and my wife was in there, too. After washing, I went and threw the water out."

The witness was asked the following questions, and gave the following answers: Q. Where did you throw it out at, Mr. Spicer? A. I went through the dining room is my best recollection, and out the door to the back porch, and threw the water out at the water shelf, and set the pan down, and went on back into the hall and into the bedroom. Yes, sir; my wife's bedroom. Yes, sir; I went through the door that opens into the hall. When I got back in there, my best recollection is, I sat down, and one of the children ran up to me. It was Janie, my little girl. And my wife says to me, 'Sam, did you bring the pan back?' and I said, 'No; I forgot it Nobie; I will go and get it for you if you want me to.' She says, 'No; I will go get it.' Q. When she started out what were you doing? A. Taking my little girl's drawers off,

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so she could get on the chamber, and go to bed ; and about the time I got them off she had gone out to the water shelf and was coming back. I will have to tell you what she told me. You see, I didn't see her. Q. Go ahead now. A. And she screamed and says, Oh, Sam ! somebody shot me,' and I jumped up, and my little girls were in front of me, and stayed in front of me, and I could not run around her as fast as I wanted to, for the little girl was in the way, and when I got to her she was over on all fours like, feet on the doorsill, as near as I can recollect, kind of on her knees, and as I came towards her she had dropped over on her left hip, and I run to her, and says, 'What is the matter, Nobie?' and she says, 'Somebody shot me, Sam;' and I says, 'Nobie, have they hurt you bad?' and she says, 'Yes, Sam ; they have killed me;' and I got her in my arms this way, and drug—pulled—her just a little, just a least bit, to where her head would nearly strike this partition wall coming between the dining room and the cook room, right besides the door at the end of the hall, going into the cook room, and the dining table stood a little further from us than the stenographer's table there. I do not remember whether she was trying to pull the door to when I got there. Well, as to what next—the best that I can remember—I have tried to think over it that she spoke of going to faint, and I ran to the mantelpiece and grabbed the camphor and pistol, and as I came back I placed the pistol in my pocket, and pulled out the stopper, and run to her and rubbed some camphor on her. Then I supposed about a minute passed. I raised up and put the pistol in one hand and started out the door, and she said, 'Sam, don't go out there ; they will shoot you ;' but I threw the screen door open and walked on out in the yard, and I heard a noise, and whirled around, and dashed as hard as I could to the front, and by the time I got between

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the two doors in the hall between the large rooms, I fired. Yes, sir; it looked like a man, and I fired, running as hard as I could."

The record presents many close and difficult questions as to the admissibility and relevancy of evidence. While no entirely new rules of evidence are involved, the application of old rules to new circumstances and conditions is involved. As to some of the questions we are unable to find authorities exactly in point, and can therefore appreciate some of the difficulties which the trial court and counsel have encountered in this case.

Special counsel was employed in the prosecution of the case in the lower court, and, on appeal, in this court. The case has been fully and ably argued by counsel both for the state and for the defense, and their presentation thereof has greatly aided us in our examination of the record.

The state contends that the evidence tends to establish one of three theories: (1) That the defendant used the negro boy, Joe Green, to place the gun and did the shooting himself; (2) that the defendant procured the negro boy, Joe Green, to do the shooting, and defendant then killed Joe Green to suppress his testimony and conceal the crime; (3) a conspiracy between defendant and Joe Green to kill Mrs. Spicer in order to procure the \$17,000 of insurance on the life of Mrs. Spicer in favor of the defendant, defendant agreeing to make some division of the proceeds with Joe Green.

The evidence is voluminous. It consists of nearly 300 pages of closely typed matter. The evidence takes a very wide range. It is admitted by the state, and was so charged by the court to the jury, that the evidence to show the defendant's guilt was wholly circumstantial.

There were scores of exceptions and questions reserved as to the admission and the rejection of evidence.

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All these have been examined, but it is impossible to treat each exception separately. We will, of necessity, have to group the objections and exceptions touching the evidence, and treat each class merely.

On the trial the state sought to prove, and did prove, that the defendant had procured several policies of insurance, in his favor, on the life of his wife; such policies aggregating about \$17,000. This fact was admissible as tending to show motive on the part of defendant to take the life of the insured—deceased.—Wills on Circum. Ev. pp. 154e, 120 359g, and authorities cited; *Com. v. Clemmer*, 190 Pa. 202, 42 Atl. 675; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *State v. Rainsbarger*, 74 Iowa, 196, 37 N. W. 153; *Brandt v. Com.*, 94 Pa. 290.

The trial court, however, allowed the state too much latitude in proving every detail connected with the procuring and collecting of the insurance policies. Many of these details were wholly irrelevant to any issue in the case, and could have no other effect than to either bias the jury or distract their minds from real issues to immaterial ones. For example, the state, over the objection of the defendant, was allowed to prove every conversation of the accused having the least reference to the insurance, though it tended to show neither guilt nor innocence, nor to corroborate or to contradict any relevant evidence.

One B. B. Kilpatrick, a brother-in-law of defendant, was allowed to testify: "He [defendant] didn't say anything about what he was going to do with the insurance money, but he told me how he was going to fix up the house; he didn't say whether he would do it with the insurance money or not."

Witness was then asked the following question: "What did he say about that?"

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After objection by the defense for illegality, etc., which objection was by the court overruled, witness stated in reply: "He stated to me that he was going to have the front part of his fireplace chiseled off, and have tiling fixed on each fireplace, and when the flies specked the other room a little more that he was going to wallpaper it, and that he was also going to wallpaper his dining room with paper that had gool-looking fruits and vegetables, something good to eat—looked pretty nice." Here counsel moved to exclude this answer to the question last hereinabove objected to, on the same grounds assigned to the question. The court overruled said motion, and to the action of the court, in so overruling said motion, the defendant then and there duly and legally excepted.

This matter was, of course, wholly irrelevant; it could have no legitimate bearing on the issues. It had no tendency to show guilt or innocence, nor to contradict or corroborate any other evidence. Its effect was to distract the minds of the jury from the real issue to that of whether or not it was proper for a man to improve his house after his wife is killed, whether by himself or some one else.

The rule is well stated as follows: "Presumptions or inferences may be, and often are, founded on circumstances which, of themselves, independent of the accusation, would not be ground of crimination. It is largely a question of fact, rather than a question of law, for the determination of the jury, whether particular conduct, or particular expressions of the accused, refer to a criminal offense, and spring from his consciousness of guilt. When it is clear that they have no relation to the offense, and that they ought not to have any influence with the jury, it is the duty of the court to reject them as evidence. But, however minute or insignificant they may

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be, shedding but a dim light upon the transaction, if they have a tendency to elucidate it, they must be admitted. They may be connected with other circumstances which will constitute a chain of evidence, leading the mind to a satisfactory conclusion.—*Johnson v. State*, 17 Ala. 624; *Campbell v. State*, 23 Ala. 45; *Liles v. State*, 30 Ala. 24 [68 Am. Dec. 108].” *McAdory v. State*, 62 Ala. 154, 159.

The state was also allowed too much latitude in proving, in the most minute detail, various acts and words of the defendant, in connection with and relation to other women than his wife. Where a man is on trial for the murder of his wife, acts of cruelty, and even of infidelity, on his part to her are admissible in evidence against him, if they are so related to or connected with the killing as to show a probable motive on his part to kill her. The illicit association and relation of the husband with other women, or even the desire of such relation, may be proven by the state on such trials, if it appears that the wife stood in the way of his gratifying that lust; but every word and act of a man to or toward other women than his wife are not so admissible in evidence, unless such words or acts have some certain tendency to show a motive for the husband to kill the wife; and, of course, there must be some other evidence tending to show that the husband did kill the wife, or that she was killed by some unlawful agency of his. Such evidence is not admissible to prove the corpus delicti, but to repel the presumption of innocence arising from the conjugal relation.

The first utterance of this court on this subject was in the case of *Johnson v. State*, 17 Ala. 618. In that case the court said: “The state was allowed to prove by Mrs. Rumpy, a near neighbor of the prisoner, that during the year preceding the death of the prisoner’s wife

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he called Mrs. Rumpy out to her gate and asked her for liberty to visit one of her daughters, and that she refused him the liberty, because he was a married man; and this evidence was excepted to. It was held by the Supreme Court of Connecticut, on the trial of one Watkins for the murder of his wife, that evidence was admissible against him showing that for some months before and down to the time of the alleged murder an adulterous intercourse subsisted between the prisoner and a Mrs. Burgess. It was held that such testimony was admissible, not to prove the corpus delicti, but to repel the presumption of innocence, arising from the conjugal relation.—*State of Connecticut v. Watkins*, 9 Conn. 47 [21 Am. Dec. 712]. It is stated by a writer that this decision produced surprise.—Wharton's Crim. Law. But the point we have to decide is not the same that was decided by the Supreme Court of Connecticut. If it were, it is probable that we should concur in opinion with that court, and hold also that it was evidence of a motive for the murder of his wife. In this case the prisoner applied to a woman for permission to visit her daughter. There can be no doubt about the criminal object of his visits. He was denied the privilege because he was a married man; there was no other objection. Now, there was an object of desire, of criminal desire, but his wife stood between him and it. This, as a motive for her destruction, was clearly admissible in evidence, because motives for every crime may be proved.—Wills on Crim. Ev. 57, 58; Rosc. Crim. Ev. 95, 697; Clewes' Case, 4 C. & P., 221. It appears by the bill of exceptions that the solicitor proposed the following question to one of the state's witnesses: Do you know that the defendant paid marked attention to any lady, shortly before the death of his wife, and, if so, state in what it consisted?" To this question the defendant ob-

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jected, on the ground that it was leading, etc., but the court overruled the objection, and it was answered affirmatively, and the prisoner excepted. This question suggested the answer desired in respect of the degree of attention paid and of the time, both of which were material. There are circumstances, however, under which the court will permit leading questions to be put, even to the party's own witness, as where it appears that the witness wishes to conceal the truth, or to favor the opposite party, or if the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it.—1 Stark. Ev., 150, 151, and notes. The court must have some discretion upon this subject; but there are no circumstances stated in the bill of exceptions which required a departure from the general rule. The bill of exceptions does not, however, set out all the evidence, so far as appears. But it is not necessary for us to decide whether the record shows error in this part of the case or not, because the judgment must be reversed on other grounds."

Another case is that of *Duncan v. State*, 88 Ala. 31, 7 South. 104, in which such evidence was held admissible. The facts and circumstances given in evidence in that case were as follows: "Alex Dean, a witness for the state, testified to a conversation had by him with the defendant, while standing at the place where the grave was dug, on the evening of the day of his wife's death (Thursday), in which defendant told him 'he was going to do something that might be a leap in the dark, but he was going to risk it' and asked him to take a note to Georgia Balderee, and a message asking her to meet him Saturday evening 'at the big gate near the plum tree,' that he was to go to the house, 'and take up a book, and ask her if it was hers, when she would understand, and he was to give her the note.' The witness further tes-

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tified that, 'about three or four weeks' before the death of Mrs. Duncan, he had another conversation with defendant, in which the latter told him of an interview between himself and Georgia Balderee, in which he advised her not to marry one Miller, unless she loved him; that he asked witness, 'What would you think if she gave me to understand that she loved me better than any other man?' and witness answered, 'That he would not be surprised.' The defendant moved to exclude this conversation from the jury as evidence, 'on the ground that it was irrelevant and misleading'; and he excepted to the overruling of his motion.

"J. S. Judah, a witness for the state, testified that he had a conversation with defendant on Friday, the day after his wife's death, in which defendant asked him 'to carry him and the Balderee woman to Ozark the next night to marry,' but witness refused; that defendant 'then set the next Thursday,' but on Saturday, 'after going to Balderee's,' he came to witness and told him 'they had decided to leave on Saturday night, and would probably go to Headland.' The defendant moved to exclude from the jury 'what was said about marrying the Balderee woman,' and he excepted to the overruling of his motion. William Windham, another witness for the prosecution, testified that, 'about two months before the death of the defendant's wife, he heard defendant say that the Balderee woman was a nice, pretty girl, and that he would like to have her.' The defendant objected, and excepted to the admission of this evidence. The prosecution proved, also, that the defendant and 'the Balderee woman' ran off together on said Saturday night, but were pursued by her father and others, overtaken in Florida, and brought back; and the defendant admitted, in his statement to the jury, that he intended to marry the girl the next day after they were overtaken and brought back."

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The court said of that evidence: "Many exceptions were reserved in this case, but they naturally resolve themselves into two groups: First, the conduct and conversation of the defendant in reference to the girl Georgia Balderee, done and had both before and after the death of Mrs. Duncan; and, in this connection, the conduct and remarks of the defendant, tending to show dissatisfaction with his wife, for whose murder he was tried and convicted. Each and all of this testimony was competent and legal, as tending to prove a motive for the commission of the offense.—*Baalam v. State*, 17 Ala. 451; *Johnson v State*, 17 Ala. 618; *Hall v. State*, 40 Ala. 68; *Id.*, 51 Ala. 9; *Marler v. State*, 67 Ala. 55 [42 Am. Rep. 95]; *Id.*, 68 Ala. 580; *Phillips v. State*, 68 Ala. 469."

In *Marler's Case* the accused was not indicted for killing his wife, but for killing a third party who was, or would be, a witness against the accused, in a divorce proceeding. The court in that case said: "The state was permitted to prove by Jacob Redman, against objection, the fact that the prisoner, Marler, stated to him that 'he was tired of his wife, and intended to get a divorce from her, and he (Marler) wanted his (Redman's) permission to marry his daughter.' This was competent, we think, to prove motive. The deceased, Dr. Colquitt, was an important witness in the divorce suit instituted by Marler against his wife. The evidence tended to show that Marler's imputed purpose, in his alleged complicity in the killing, was to get rid of deceased as an obstacle to his success in obtaining such divorce. This motive, if, in fact, it existed, was material to strengthen the probability of his guilt. If he wished to marry Redman's daughter, this might intensify the desire for a divorce, and this again tend to quicken eagerness to destroy the witness."

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In *Baalam's Case*, 17 Ala. 451, this court, as to the admissibility of evidence to show malice, said: "The prosecutor then offered a witness to prove that the deceased and the prisoner were husband and wife, and about a year previous to the homicide they had quarrelled and separated, but it was not shown that there had been any quarrels between them since the separation, or that they ever were reconciled. To this testimony thus offered the prisoner objected, but his objection was overruled. This evidence was exceedingly remote, and entitled to but little weight from the jury in coming to a conclusion as to the guilt or innocence of the prisoner, but we cannot say that the court erred in admitting it. When it is shown that a crime has been committed and the circumstances point to the accused as the guilty agent, then proof of a motive to commit the offense, though weak and inconclusive evidence, is nevertheless admissible.—1 Stark. Ev. 502, Wills on Presump. Ev. 56. On the other hand, the total absence of all motive or reason why the accused should do the act must always operate strongly in his favor, when the inquiry is whether the accused perpetrated the deed, and the evidence to prove his guilt is circumstantial only. But it must be apparent that, if a motive be evidence in such cases to be weighed by the jury, then evidence tending to prove the existence of the motive cannot be rejected. It may, however, be well to remark that a jury cannot be too cautious in attaching importance to such evidence; for, if the motive itself is a weak and inconclusive circumstance, how much less conclusive is the evidence which only tends to prove the existence of the motive? Such evidence, however, cannot be wholly rejected; it must go to the jury, but they should be guarded as to the importance they attach to it."

So the rule is that any evidence which tends to show motive, however slight, is admissible, but that courts

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and juries should be cautious in its use. There are, however, limitations upon this rule, as general as it is. Every act, word, or deed of a man, for several years previous to the crime, and for months thereafter, is not admissible to show motive. Motive is an inducement, or that which leads or tempts the mind to do or commit the crime charged. The law does not deal with motive in a speculative sense. The motive may not only be material in some cases it may be by the jury considered controlling; but it cannot be speculated upon or imagined any more than other circumstances. The motive attributed to the accused must have some legal or logical relation to the act charged, according to known rules and principles of human conduct. If the motive has not such relation to the crime charged, it cannot be considered a legitimate part of the proof. If a given circumstance has no tendency whatever to prove a given motive, it is, of course, not admissible. The principles of the law of evidence that should govern criminal trials, which were stated by Lord Erskine, are applicable to evidence to show motive. He said that these principles are "founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life."—24 How. St. Tr. 966.

The limitation upon the rule as to the admissibility of such evidence is well stated by the Supreme Court of Massachusetts in the case of *Com. v. Abbott*, 130 Mass. 472. It is there said: "It is a cardinal rule governing the production of evidence that the testimony offered must correspond to the allegations, and be relevant to the issue on trial. It is not necessary that the evidence should bear directly on the issue. It is sufficient if it tends to establish the issue or constitutes a link in the chain of proof. But, in order to be admissible, it must either alone, or in connection with other evidence pro-

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duced, be capable of affording a reasonable presumption or inference as to the principal fact in dispute. The rule excludes all collateral facts which tend to divert the mind from the real question, and are calculated only to prejudice and mislead the jury. The existence of a criminal motive is an element which it is often necessary to establish in order to give character to the acts and conduct of a party charged with or suspected of crime. In such case the conduct or declarations of a party, both before and after the principal fact in issue, are admissible, provided they are sufficiently near in point of time, and sufficiently significant of the motive or intent to be proved. The rules which govern human conduct are to be reasonably applied in these cases, as in all other investigations of fact."

Applying those general rules to the case then in hand, the court said: "It was clearly competent for the defendant to prove that he did not commit the murder, by showing that some other person did; and, as one step towards that end, he had a right to prove such a state of ill feeling on the part of the husband, existing at the time of the homicide, as would furnish him with a motive for the commission of the crime. But the difficulty is that the ill feeling here offered to be shown was not of such a character as to afford a reasonable ground for the inference that it existed at the time of the murder. It is to be considered in connection with the important fact that during the time covered by the evidence—namely from 1873 to 1877—the parties lived together as husband and wife, and continued so to live together as long as she lived. There was no evidence offered of the continuance or existence of any ill feeling, or of any occasion for ill feeling, after the removal from Lexington in 1877 to the time of her death in 1880. The whole evidence fails to show such deeply seated and enduring

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hostility on the part of the husband as to lead to the presumption that, without further manifestation, and under the concealment of kindly relations, it continued to exist and so increase in power as to furnish a motive for the commission of the crime."

We are not prepared, however, to sanction the doctrine that mere lapse of time alone would render evidence to show motive inadmissible; this would go rather to its weight and sufficiency than to its admissibility. Certainly such has been the holding of this court.

There was evidence in this case that the defendant had had improper relations with other women than his wife, and that he had traveled about with one of these in an automobile, and that they each registered at certain hotels. These, and similar facts, were admissible as having a natural tendency to show motive. But the trial court allowed the state entirely too much latitude in this respect, over the objection of the defendant; circumstance after circumstance was admitted, over defendant's objection, which had no possible tendency to prove motive, criminal intimacy with other women, infatuation, or lust, or even admiration for them, much less to show a desire to rid himself of his wife so that he might gratify his desire as to such women. We will mention a few examples of such testimony:

A witness, Caton, was examined, and was allowed to detail a conversation which he had had with defendant about a young lady. The substance of this conversation was that, the defendant and witness being at a camp meeting, and witness walking into church with a young lady whom it seems the defendant did not know, defendant said to him that if his wife was not there he would take the girl away from witness.

Another was the conversation between J. S. Mulkey and the defendant, to the effect that defendant advised

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witness not to get married; that if the defendant was in witness' place he would not marry any woman the sun ever shone upon.

Another was the conversation with the witness Snowden, in which the defendant said, in a laughing way, that "if he was not married he wouldn't be."

There was no direct evidence in this case to show infelicity between the defendant and his wife; such evidence as this was entirely too remote and too far-fetched to be admissible to show motive on the part of the husband to kill his wife. Such remarks are frequently made by married men in pleasantry, and certainly do not tend to show motive on their part to take the life of their wives; they are often made in jest, or merely casually, as these were shown to have been made, without tending in the slightest to show domestic infelicity.

There was no direct evidence in this case that the defendant was cruel or unkind to his wife. That coming nearest to doing so, showing the worst phase of his conduct towards her, was the testimony that on one occasion he cursed her or cursed in her presence. The witness swore both ways as to that.

The testimony as to the domestic relations between the defendant and his wife, detailed by the father of his wife on cross-examination by the state, was in part as follows:

"The defendant's treatment of my daughter was good. I never knew of his being unkind to her at all. Three of her children were born at my place. The little girl, Janie, was born there. Sam was there when she was confined, and gave her every attention. As far as his treatment of her is concerned, it was good enough. He always tried to provide for her and carry her in style, and to make a good living for her and the children. He appeared to like his children very well. The treatment

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of my daughter towards her husband was kind and affectionate. She was loving towards him. I never saw anything take place between them that indicated at all that they were uncongenial. I don't know of any serious difference that ever occurred between them. My daughter made a statement to me as to who it was she thought shot her."

The trial court also fell into error in allowing the state to prove by Mrs. Hamby a conversation she had with the deceased the day after the shooting. This was not offered as a dying declaration nor as a part thereof. It is claimed by the state that it was admissible to contradict the dying declaration of the deceased. If this evidence had tended to contradict the dying declaration, it would have been admissible, under the rule declared in *Shell's Case*, 88 Ala. 14, 7 South. 40.

We fail to see how the testimony of Mrs. Hamby, as to what deceased said to her, tends in the slightest to contradict the dying declaration of deceased. Every word said in both statements by the deceased could be true. The dying declaration in this case was proven by the state's own witness. It is true that most of it was brought out by the defendant, on the cross-examination of the state's witness, the doctor who dressed her wounds and attended her. This purely hearsay evidence was not a part of the *res gestæ* of the killing, nor of the dying declaration, nor was it offered as such. The defendant was shown not to be present, and, of course, was not bound by such testimony.

It is contended by the state that the evidence tended to show that defendant was not in the house when the shooting occurred. We fail to find any such tendencies, unless it could be said that the mere fact that her statement *did not affirm that he was in the house* tended to show that he was outside. The statement did not pur-

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port or attempt to account for the presence or the absence of defendant at the time of the shooting. The mere fact that a part of the statement was to the effect that the little girl was the first to get to the deceased did not at all show that the defendant was not in the house, nor to contradict the dying declaration.

It was also error to decline to allow the defendant to prove threats, on the part of Joe Green, the negro boy, to kill the defendant. There was evidence in this case, and properly so, to the effect, or which would authorize the jury to find, that the negro boy killed the deceased through a mistake of identity; that is, that the boy intended to kill the defendant, and not the deceased.

It is very true that it is not permissible for the defense to prove threats on the part of a third party to kill the deceased, when there is no evidence tending to show that such third party, and not the defendant, killed the deceased; but the rule is different where there is other and independent proof going to show that such third party actually killed the deceased. See Wills on Cir. Ev. p. 237p. where the rule is thus stated:

"Courts generally do not allow the accused to introduce evidence that third persons had threatened to do the act in question; although it cannot be doubted that proof that a third person did the act in question excludes the conclusion that the accused did it; and if threats by the accused tend to show that he did the act, then why should not threats of third persons tend to show that they did it? The reasons given for excluding such testimony are various. See *State v. Beaudet*, 53 Conn. 543, 4 Atl. 237, 55 Am. Rep. 155; *Schoolcraft v. People*, 117 Ill. 271, 7 N. E. 649; *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *State v. Crawford*, 99 Mo. 74, 12 S. W. 354; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346. But see *Alexander v. U. S.*, 138 U.

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S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954, and *Worth v. R. R. Co.* (C. C.) 51 Fed. 171, where such evidence was admitted. The defendant cannot show that others had threatened to kill the deceased in the absence of any other evidence tending to connect such others with the homicide in question (*Woolfolk v. State*, 81 Ga. 551 [8 S. E. 724]; *State v. Mann*, 83 Mo. 589; *State v. Duncan*, 28 N. C. 236; *Henry v. State* [Tex. Cr. App.] 30 S. W. 802); but, in connection with such other evidence, threats by the third persons may be proved (*Morgan v. Com.*, 77 Ky. [14 Bush] 106); also where the evidence against the defendant is entirely circumstantial (*Murphy v. State*, 36 Tex. Cr. R. 24 [35 S. W. 174]; *Leonard v. Terr.*, 2 Wash. T. 381 [7 Pac. 872])."

In *Morgan's Case*, 77 Ky. (14 Bush) 106, it is said: "We therefore are of opinion that when, on the trial of a man for the commission of a crime, the proof is conflicting as to whether he or another person perpetrated the offense, the prisoner has the same right to show the conduct, acts, and motives of the other, that the commonwealth has to show the conduct, acts, and motives of the prisoner, and that the evidence of the feelings of Conn toward the deceased, as evidenced by previous threats and personal conflicts, should have been permitted to go to the jury."

The books show that such evidence is, for a greater reason, admissible when the evidence, as in this case, is wholly circumstantial against the accused. The state insists that this was error without injury, because the accused was himself allowed to testify to such facts. We cannot agree that, if error, it was without injury for that reason. To restrict a defendant to proving his defense by his own evidence is both error and injury.

While the threats offered to be proven in this case were not threats to kill the deceased, but to kill the de-

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fendant, there was proof that the person who made the threats intended to kill the defendant, and not the deceased. It has been held by this court that, where the defendant killed one whom he did not intend to kill, his threats to kill another person—the one whom he thought he was killing—are admissible.—*Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45. For similar reasons we think that the evidence of threats to kill the defendant, by the negro, Joe Green, was admissible.

We are also of the opinion that it was error to decline to allow the defendant to prove by his brother that the latter had employed the former to carry the young lady, Miss Harper, away, on account of trouble between the young lady and the defendant's brother. The state had introduced a great deal of evidence to show intimate, if not criminal, relations between the defendant and this young lady, for the purpose of showing motive on the part of defendant to kill his wife. This evidence offered by the defendant tended to rebut the presumption that defendant's associations with this young lady were on account of intimate relations between them, or of any infatuation, of one for the other; and to prove that they were on account of trouble between the young lady and the defendant's brother. It tended to account for the defendant's being with her in the automobile, and for the two having registered at various hotels. The defendant ought certainly to have been allowed to show or explain the circumstances under which, on these occasions, he was found in the company of this young lady. The state insists that, if this was error, it was cured by allowing the defendant himself to testify to substantially what he proposed to prove by his brother. If it was competent evidence, in rebuttal of the evidence offered by the state—and we feel sure that it was—then the court could not restrict the defendant to proof of

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the facts by his own testimony. The court has no right to compel the defendant to testify in his own case.

Some of the proof of the details of the brother's trouble with the young lady was not admissible, and the court properly declined to allow such proof; but the facts that he had had trouble with her, and that he had employed defendant to carry her away, and that defendant was on this journey—this mission—when seen in the automobile and at the hotels with this young lady, were admissible; and it was error to restrict or limit the jury to the testimony of the defendant himself.

There was no error in declining to require the state's counsel to turn over to the defendant's counsel the slip of paper on which Spicer had written his name. It was not offered in evidence, and defendant's counsel had no right to see it.

There was no error in allowing the state to prove that defendant made proof of the death, soon after the killing of his wife, to the insurance company, nor in declining to allow defendant to prove that he stated to the insurance agents that he was in no hurry to make the proof.

It was error, however, to allow the state to go into the details of the defendant's purchasing and exchanging automobiles, and thus to prove everything the defendant said and everything the agents said. None of this testimony had anything whatever to do with any issue involved in this trial. The remarks of the defendant that a particular machine was just right for carrying ladies to ride, or for carrying his children, did not make such evidence relevant. It served only to incumber the record and to distract the minds of the jury from the real issues involved on the trial.

It was likewise error to allow the state to prove, by one Davis, that he saw a man in the house of a woman

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by the name of Berry, and that the man's name was Spicer. The witness was not able to identify the defendant as the man, and, if he had been, the occasion was after the death of his wife, and the circumstance was not shown to have the slightest connection with, or relation to, the death of defendant's wife. It was wholly irrelevant and immaterial, and was highly calculated to prejudice the jury against the accused.

The state offered letters written by the defendant while in jail, in which he stated he expected to tell the truth if it broke his neck. The defense then offered to prove that, at the time one of the letters was written, defendant had not been accused of killing his wife, but was in jail on the charge of killing the negro boy, Joe Green, who, the defendant says, killed his wife. The court declined to allow him to make proof of this fact by the warrants and the capias under which he was then in jail. This, we think, was error. These documents were the best evidence of the charges under which the prisoner was held, and of the dates of his arrests and confinements. And if, at the time he wrote the letters, he had not been charged with, or arrested for, the killing of his wife, but had been as for the killing of the negro boy, this was a circumstance tending to show that it was the killing of the negro, and not the killing of his wife, to which he referred in his letter.

There are many other errors as to rulings on testimony insisted upon by counsel for the defense, but we deem it unnecessary to further treat them in detail; all fall within one or another of the classes above treated.

We find no error as to the charges or instructions of the court. The charges refused to the defendant were either bad, misleading, or covered by other charges given at the request of the defendant.

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As the case must be reversed, it is not necessary to particularly pass upon questions touching the organization of the jury, further than to say that, in capital cases, the mode of selecting the jury of 12 from the special venire is changed by the new jury law from what it formerly was. The jury is now selected by the parties by their alternately striking from a list furnished by the court until 12 only remain; whereas, before it was selected by the parties by their challenging for cause, or peremptorily, those persons presented, until 12 were selected. It is now made the duty of the court to pass upon the competency of those persons appearing, in order that a list may be made out from which the parties are to alternately strike, the state as well as the defendant, as the statute directs. It is possible that this statute may change the rule as to the court's excusing *ex mero motu* those who are subject to challenge for cause only by the parties, and which might be waived, illustrated in the decisions in *Bell's Case*, 115 Ala. 37, 22 South. 526, *Murphy's Case*, 37 Ala. 142, and *Lyman's Case*, 45 Ala. 78; though as to this we do not now decide. It is certain, however, that the court cannot decline to place upon the list from which the parties are required to strike the names of persons appearing as a part of the venire and who have not been properly excused from such service; except for some cause which disqualifies such persons from serving on that case. That is to say, the law fixes the qualifications of jurors, and not the court. The court can, and must, pass upon questions of fact touching whether or not the persons appearing possess the qualifications which the law prescribes; but the court cannot add to nor take from the qualifications which the law fixes.

We are not, of course, speaking in reference to the statutes which authorize the court to excuse any per-

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son from serving as a juror for the term, or upon a particular trial, for some reason personal to the juror so excused, such as the sickness of the juror or of some member of his family, or other personal exigency; but we are now speaking of the power of the court to decline to place upon the list the names of persons appearing, and not so excused, for some reason for which the law does not disqualify such person as a juror in the particular case.

The rules are of necessity different in capital cases, which the law directs must be tried by special venires, and not by the regular ones. This was well pointed out by BRICKELL, C. J., in *Phillips v. State*, 68 Ala. 474, where it was said: "The purpose of the statute cannot be misunderstood. The accused has not a right to be tried by such jury as may be selected from the body of the county, but by a jury selected from the list served upon him, so far as was practicable. It is intended that, as to the persons summoned, he shall have full opportunity of ascertaining whether causes for challenge exist, and also to inform himself as to whom, if any of them, he should exercise the right of peremptory challenge.—*Parsons v. State*, *supra* [22 Ala. 50]. Of what avail is the right, if, without sufficient cause, the court can discharge from service persons who have been summoned and drawn? Where is the limit of the power of the court, if it can be exercised as to one such person? It could be exercised until the list was exhausted, and thus the prisoner driven to the selection of a jury from talesmen summoned from the body of the county, as to whom he could not intelligently exercise the right of challenge, either for cause, or peremptory. It is an error fatal to a judgment of conviction, when it appears the court has by its action denied, impaired, or dimin-

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ished this right of the accused.—*Parsons v. State, supra; Boles v. State*, 13 Smedes & M. [Miss.] 398.”

In this case some of the jurors were excused because they were opposed to capital punishment, and one because he had a fixed opinion. The statute makes veniremen subject to challenge for cause, and it would seem that it was not error for the court, on its own initiative, to excuse these jurors and not put them on the list from which the parties were required to strike; the new jury law probably working a change in this respect.

One of the jurors excused was not a householder or freeholder of the county, but he could read; another was a householder and freeholder, but could not read English. In this it would seem there was error, because the present statute does not appear to make both conditions—that is, householding or freeholding, and ability to read English—a qualification of a juror. In fact, the statute expressly provides that, if a person cannot read English, yet, if he has all the other qualifications prescribed and is a freeholder or householder, his name may be placed on the jury roll and in the jury box. This state of facts would seem to qualify him as a juror, and the court could not ingraft other qualifications upon those prescribed by the statute, and certainly could not excuse one whom the law says is qualified. See Acts 1909, p. 305.

For the errors pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

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Francis v. The State.*Murder.*

(Decided June 11, 1914. 65 South. 909.)

1. *Evidence; Letters.*—Where a witness identified a letter purporting to be signed by the letters "O. L. T." and the envelope in which the letter was received bore the postmark of the town stated in the date line in the letter, but on the back thereof were the words, "From J. W. T." followed by the name of the town, the letter was properly admitted in evidence against the objection that the envelope purported to come from one party while the letter purported to be signed by another.

2. *Same; Absent Witness; Testimony.*—The testimony of a witness taken down at the preliminary trial by a stenographer, and identified by such stenographer as the testimony of such witness, may be read on the trial, if the witness is beyond the jurisdiction of the court at the time of the trial.

3. *Same; Self-Serving Declaration.*—Statements by defendant made sometime after the shooting explaining and exonerating his acts, are not parts of the *res gestæ*, but are self-serving and properly excluded when offered on behalf of defendant.

4. *Appeal and Error; Harmless Error; Evidence.*—Where facts are subsequently proven without objection, or are admitted by the other party, any error in excluding evidence of such fact is not prejudicial.

5. *Charge of Court; Covered by Those Given.*—It is not error to refuse requested charges substantially covered by requested charges given.

6. *Same.*—The court having charged that defendant was under no legal obligation to retreat, but could stand his ground and repel the attack, if any was made, the refusal of a charge that defendant had been employed as a night watchman at the place where the difficulty occurred, and was under no obligation to retreat, but could stand his ground, and resist an attack made on him, was not erroneous as the material matters therein contained had already been given in the other instruction.

7. *Homicide; Self-Defense.*—The belief of accused of imminent danger must be a reasonable belief produced from surrounding circumstances in order to enable him to rely on self-defense.

8. *Same; Instructions.*—A charge asserting that the danger need not be actual, but if the circumstances create in the mind of defendant a reasonable belief that he is in imminent danger of great bodily harm, or of losing his life, he may shoot his assailant to save his own life, omits essential elements of self-defense, and is properly refused.

9. *Same.*—A charge combining some elements which are sought to reduce a homicide to manslaughter, with other elements applicable to the theory of self-defense, is misleading and properly refused.

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10. *Same*.—A charge that if defendant did not provoke the difficulty, and when he fired the fatal shot the circumstances were such as to create in his mind the belief that he was in danger of losing his life or of suffering great bodily harm, he must be acquitted, was properly refused for not predicating freedom from fault in bringing about the difficulty; the expression "did not provoke the difficulty" not being the equivalent of freedom from fault.

APPEAL from Limestone Circuit Court.

Heard before Hon. D. W. SPEAKE.

Jack Francis was convicted of murder, and he appeals. Affirmed.

The following charge was refused to defendant:

(1) I charge you that defendant, having been employed as night watchman at the place where the difficulty occurred, was under no obligation to retreat or run away from his place of business, but that he had a right to stand his ground and resist an attack made on him, if any were made.

Charge A given is as follows:

Defendant in this case was under no legal obligations to retreat from the place where the difficulty occurred, but he had a right to stand his ground and repel an attack, if any such attack was made.

(2) If you believe from all the evidence in this case that defendant had or used more force than was necessary to repel or drive away deceased, but that defendant had the honest and bona fide belief that his life was in danger, or that there was imminent danger of suffering great bodily harm at the hands of deceased and he shot deceased, if defendant was free from fault in provoking the difficulty, then you cannot find defendant guilty of murder.

(3) I charge you that the danger need not be actual, but if the circumstances be such as to create in the mind of defendant the reasonable belief that he is in imminent danger of suffering great bodily harm or of losing his life, he has the right to act on the appearance of

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things and shoot his assailant in order to save his own life. And this is true even though as a matter of fact no harm was intended or meant by deceased.

(4) If you believe from all the evidence in this case that if defendant was scared and greatly frightened when he fired the shot, and when he did so he was reasonably impressed with the bona fide belief from the circumstances in the case that he must do something to protect his life and fired the shot without intending to kill deceased, but to protect himself, you cannot find him guilty of murder in any degree.

(5) If you find from all the evidence in this case that defendant did not provoke the difficulty which resulted in the death of Summerfield Hall, and that he did not have to retreat from the place where the difficulty occurred, and if you further find from the evidence in the case that when he fired the shot the circumstances were such as to create in his mind the reasonable belief that he was in danger of losing his life or of suffering great bodily harm, you should acquit.

W. W. MALONE, for appellant. The court was in error in admitting the letter.—*Harris v. State*, 73 Ala. 495. The court was in error in admitting the testimony of the absent witness.—*Thompson v. State*, 17 South. 512; *So. Ry. v. Bonner*, 37 South. 702. Charge 3 should have been given, as it was not substantially covered by any other charge given.—*Thomas v. State*, 106 Ala. 19; *DeArman v. State*, 71 Ala. 351. Charge 5 should have been given.—*Keith v. State*, 11 South. 914; *Naugher v. State*, 17 South. 24. Charge 6 should have been given. *Rogers v. State*, 62 Ala. 174.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. The court was not in error in admitting the letter.—*Lowe v. State*,

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86 Ala. 47. The letter being in evidence sufficiently shows that the witness was beyond the jurisdiction of the court, and was a sufficient predicate for the introduction of his testimony taken on the preliminary hearing.—*Burton v. State*, 107 Ala. 68; *Lowery v. State*, 98 Ala. 45. The statement of defendant was self serving and properly excluded.—*Seams v. State*, 84 Ala. 410. Counsel discuss charges refused, but without citation of authority.

GARDNER, J.—The defendant was convicted of murder in the first degree, and his punishment fixed at life imprisonment. The trial was had on October 3, 1913.

It is first insisted by counsel for appellant that there was reversible error in the admission in evidence by the trial court of the testimony of one O. L. Turley, taken on preliminary trial; said witness being absent on the final trial.

The witness Rankin, one of the counsel for the state, was permitted to testify, without objection, that he examined O. L. Turley as a witness on preliminary trial of this case; that he had a conversation with said Turley in which he said his residence was in Nebraska and his address Freemont, Neb.; that witness told him he would let him know what day to come when the case was set for trial; that said Turley told him he was going to Nebraska; and that he left Athens the next day. It was also proved by witness Strane that he was at the station the next day after the preliminary trial and saw the witness Turley get on the train going north, and that he said he was going to his home in Nebraska; that he has not been seen in Athens or in the county since that time.

The witness Rankin identified a letter received by him purporting to have been signed by said O. L. Turley,

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and also the envelope in which it was received. The envelope was postmarked "Freemont, Neb., Aug. 30, 11:30 a. m., 1913." The letter was headed and dated "Freemont, Neb., Aug. 29-13." It purported to be signed by O. L. Turley, and was addressed to J. C. Rankin, attorney at law, Athens, Ala., and its contents clearly indicated that the said Turley would not attend the trial unless furnished transportation by the state. On the back of the envelope were the words: "From J. W. Turley, Freemont, Nebr." The defendant's first objection to the letter being admitted in evidence was upon the specific ground that the envelope purports to come from one J. W. Turley, and the letter purports to be signed by O. L. Turley. We think it clear that this was not sufficient to exclude the letter from evidence. To a question asked witness Rankin as to identification of the letter there was objection upon specific grounds. We have considered each, and we conclude they were not well taken.

The testimony of the witness O. L. Turley which seems to have been taken down at the preliminary trial by a stenographer was identified as his testimony by the stenographer who took the same and was by her read to the jury from her notes, and she testified that it was a correct report of the witness' testimony on preliminary trial. The evidence was admitted by the court.

We are of the opinion that in this there was no error.

"The testimony of a witness on a former trial or prosecution of the defendant, for the same offense, is admissible as evidence against him on a second trial, if the witness is beyond the jurisdiction of the court, whether he has removed from the state permanently, or for an indefinite time."—*Lowe v. State*, 86 Ala. 47, 5 South. 498.

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The meaning of the rule is fully discussed and the authorities are reviewed, in the above-cited case. The following cases may also be construed as supporting the ruling of the trial court.—*Burton v. State*, 107 Ala. 68, 18 South. 240; *Lowery v. State*, 98 Ala. 45, 13 South. 435 (second headnote).

Charge 1, refused to defendant, was sufficiently covered by the charge given by the court, designated by us, for convenience, "A," as found on page 47 of the transcript. This suffices as a disposition of this charge, but we do not mean to indicate an approval of the charge as asked.

Charge 2, requested by defendant, was properly refused. The belief of defendant of imminent danger, etc., must be a reasonable belief produced from the surrounding circumstances.—*Storey v. State*, 71 Ala. 329. The charge also appears to be somewhat confused and therefore misleading.

Charge 3 omits other elements essential to self-defense and was properly refused. It goes much further than the charge held good in *Snyder v. State*, 145 Ala. 33, 40 South. 978.

Charge 4 is confusing, as it seems to attempt to combine some elements which are sought to reduce the killing to manslaughter, with other elements applicable to the theory of self-defense. Its tendency was to mislead, and its refusal was not error.

The words found in charge 5, that "he did not provoke the difficulty," as there used, are not, in our opinion, the equivalent of the words, "free from fault," as required by our cases.

Charge 6 was substantially covered by the charge given at the request of the defendant, designated by us, for convenience, "B," as shown on page 45 of the transcript.

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Objection of the state was sustained to the question which sought to elicit what was the duty of the defendant, who was night watchman at the cotton mill, and who was on duty as such night watchman at the time of the fatal shooting, and also as to whether defendant had been robbed the night before, and as to his being armed, etc. It is unnecessary that we determine whether or not any of these questions called for relevant and material evidence under the circumstances of this case, for the reason that it was subsequently admitted by the state that the duties of defendant as night watchman were to protect the property of the mill, and the defendant was permitted, without objection, to testify as to his specific duties, his going around the mill, etc., to keep up the fires and to protect the property; that he was always armed while in the discharge of these duties and was required to go armed; and that he had been robbed the night before. The defendant can therefore not complain as to any previous rulings as to such matters—matters which were subsequently admitted in evidence without objection, or were confessed by the state, and which were uncontroverted.

Questions which sought to elicit testimony as to what defendant said, some time after the shooting, by way of explanation and exoneration of the act, were clearly subject to the objection interposed. Such statements were not shown to be a part of the *res gestæ*, were mere narratives, and came under the condemnation of self-serving declarations.

We have thus briefly made review of those matters argued by counsel which seem to us to merit special mention.

We have given to the record and to each point presented that careful consideration which the importance of the case to this defendant and to the state requires,

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and we do not find any reversible error committed by the court below in the trial of this cause. It results that the judgment of the circuit court is therefore affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ.,
concur.

Tittle v. The State.

Murder.

(Decided June 30, 1914. 66 South. 10.)

Homicide; Evidence; Dying Declarations.—Where, after making a dying declaration tending to show murder, deceased admitted to be true certain statements made by defendant in his presence which exonerated defendant, such statements are competent as a part of the dying declaration showing what occurred and describing the situation between the parties at the time of the fatal difficulty, and it was error to restrict its scope to contradiction of the previous declaration.

(de Graffenried, J., dissents.)

APPEAL from Marion Circuit Court.

Heard before Hon. C. P. ALMON.

Frank Tittle was convicted of murder and he appeals.
Reversed and remanded.

E. B. & K. V. FITE, and A. H. CARMICHAEL, for appellant. In restricting the statements of the defendant made in the presence of deceased, and admitted by deceased to be true, to a contradiction only of the previous declaration of deceased, the court was guilty of prejudicial error.—*Maloy v. State*, 8 Ala. App. 73; *Hussey v. State*, 87 Ala. 121; *Ex parte Key*, 5 Ala. App. 274, and cases there cited. Counsel discuss other matters, but in view of the opinion it is not deemed necessary to here set them out.

[Tittle v. The State.]

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. The court was not in error in its instructions as to the scope and effect of the admitted statements of defendant made in the presence of deceased.—*Shell v. State*, 88 Ala. 14; 1 Bish. Crim. Proc. 1209; 20 Ohio St. 460.

SAYRE, J.—Defendant was convicted of murder, and appeals.

The state offered evidence of a dying declaration made by deceased which tended to show a case of murder. Defendant testified to a case of self-defense, and adduced evidence of frequent statements by deceased previous to the fatal encounter to the effect that he had killed five men and was going to kill the sixth; such statements having been made under circumstances affording an inference that deceased on these occasions had in mind defendant as the sixth victim of his wrath. Witnesses for defendant also testified that, subsequent to the dying declaration offered in evidence by the state and shortly before the death of deceased, defendant approached the bedside of the wounded man and said: "Uncle Here, I hated to do this, but you know I had to do it. You told me you had killed five men and would kill six. Didn't you tell me that, Uncle Here?" To which deceased replied, "Yes."

Referring to this testimony and other of similar import, the court, in its oral charge to the jury said: "Evidence that deceased made a different statement at the house of how the difficulty happened, if he made a different statement to what the state offered as a dying declaration, is admissible as evidence, not as a dying declaration, but for the purpose of contradicting the dying declarations offered by the state. You will take the evi-

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dence, not as to how the difficulty happened, but to contradict the evidence offered by the state as to how it happened, and consider it in connection with the evidence of the dying declarations in determining what weight you will attach to the testimony offered by the state as to how the difficulty happened."

In this statement there was error prejudicial to defendant. The statement made by deceased, or his acquiescence in the statement made by defendant, was after the dying declaration introduced by the state. Declarant was evidently in a desperate state, as he must have realized from the nature and number of his wounds and the profound prostration they had already produced. There was nothing to show that, in the interval which had elapsed since the declarations admitted at the instance of the state, he had expressed or conceived any hope of recovery or that there was in fact any chance of a favorable issue in his case. It cannot be safely said that this declaration was not in some admissible sort a rendition of what occurred and a description of the situation between the parties at the time of the fatal difficulty; nor have we found in the record any reason why it had not as much sanction in the condition of deceased as the previously made declarations shown in evidence on behalf of the state. It was, in short, a dying declaration, had immediate relation to the *res gestæ* of the difficulty, and tended to acquit defendant of fault; at least the jury may have assigned such meaning to it, and its interpretation and weight were for the jury. It was hence admissible and should have been considered by the jury, not only as tending to impeach previous declarations made by deceased, but as original substantive evidence of what occurred at the time of the difficulty.—*Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276. In *Shell v. State*, 88 Ala. 14, 7 South.

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40. the statement considered there and held to be admissible for the purpose only of impeaching a dying declaration shown on behalf of the prosecution was not offered as being itself a dying declaration admissible as original substantive evidence of the facts stated, but only as a contradictory statement admissible for the impeachment of the declaration offered by the state. The court held it was properly admitted for the limited purpose for which it was offered, notwithstanding no predicate could be laid nor any cross-examination had. Here, on the contrary, the declaration about which the court spoke was entitled to consideration as a dying declaration and carried possible inferences of considerable favor to defendant. The court erroneously limited and circumscribed the office and evidential purpose and effect of the declaration, and for this the judgment of conviction must be reversed.

The language of the court, in speaking of the meaning and proper office of the evidence of the character of deceased as a turbulent and dangerous man, finds authority in our cases and cannot be held for error.—*Cleveland v. State*, 86 Ala. 1, 5 South. 426, and cases cited.

The question made about the venire will probably not arise upon a second trial and need not be considered at this time.

For the error indicated, a new trial will be ordered.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur. DE GRAFFENRIED, J., dissents. MAYFIELD and GARDNER, JJ., not sitting.

[Pope v. The State.]

Pope v. The State.

Murder.

(Decided June 30, 1914. 66 South. 25.)

1. *Homicide; Degree; Jury Question.*—Where there was evidence from which a rational mind could infer that defendant was guilty of murder in the first degree, it became a question for the jury to determine the degree of guilt, and not a question for the trial court.

2. *Same; Evidence.*—Where the murder was alleged to have followed the burglarizing of a gin house of deceased, evidence that sorghum seed and peas similar to that alleged to have been stolen from the gin house of deceased were found under a pile of lumber several hundred yards from defendant's house was properly admitted, notwithstanding the lumber was located on land which did not belong to defendant, but was piled there by defendant with the consent of the owner, there being other evidence connecting defendant with the crime.

3. *Same.*—Where the murder was alleged to have been committed by beating deceased over the head, evidence that, on the day after the homicide, a pair of shoes, alleged to have belonged to defendant, and having blood and flesh on them, were found under a house on defendant's premises, was admissible.

4. *Same.*—Where it appeared that defendant went to the mill of deceased on the afternoon before the commission of the crime for the ostensible purpose of having his corn ground into meal, the state claiming that his purpose was to examine the premises preliminary to burglarizing them, evidence that he told a simple minded boy who slept in the mill that he ought not to sleep in the millhouse, and that a snake might bite him there, was admissible.

5. *Same.*—Where the evidence of the identity of the person committing the murder was circumstantial and tended to show that the crime was committed either by defendant or by a certain other person, evidence that such other person was in his room and could not possibly have been at the scene of the crime, was properly admitted.

6. *Same.*—The testimony of the mother of a person who had been suspected of committing the crime with which defendant was charged, that such other person was in his room and not at the scene of the crime, was properly admitted, notwithstanding that at the time she gave such testimony her son was in jail charged with the crime, as this fact merely affected the value of her testimony.

7. *Same.*—The fact that relevant evidence is inconclusive is not ground for excluding it in a murder case or other criminal prosecution.

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

[Pope v. The State.]

Ervin Pope was convicted of murder in the first degree, and he appeals. Affirmed.

THOMAS J. HARRIS, E. D. WILLETT and F. D. PEEPLES, for appellant. Counsel discuss the various errors assigned in the light of the opinions rendered on the former appeals in this case with the insistence that prejudicial error intervened.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. On the authority of the former appeals in this case the judgment of conviction should be affirmed.

DE GRAFFENRIED, J.—This is the fifth appeal in this case. After a thorough consideration of the evidence, this court, on the first appeal, declared that the evidence in the case fairly and reasonably permitted inferences favorable to the guilt of the defendant, and for that reason that the trial court was not authorized, under the law, to give to the jury affirmative instructions on behalf of the defendant. The records which have, on the various appeals, been brought to this court have, perhaps, given to this court a peculiarly familiar acquaintance with each piece of the testimony in the case which reasonably permits of inferences favorable to the guilt of the defendant, and have also given to the court a peculiar and intimate acquaintance with each question of law which can under the evidence, in any way, be invoked on behalf of the defendant.

The defendant in this case has again by the verdict of a jury been adjudged guilty of murder in the first degree, and has again been sentenced to death. Out of respect to our duty under the law, we have, with a full knowledge of the gravity of the situation, again carefully examined all the evidence in this case, and, after

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having done so, we can find no reason why we should change our announcement, made upon the first appeal, that in our opinion, under all the evidence, the question as to whether the defendant is or is not guilty of murder in the first degree is a question of fact for the determination of a jury and not a question of law for the determination of a court.—*Pope v. State*, 168 Ala. 33, 53 South. 292; *Pope v. State*, 174 Ala. 63, 57 South. 245; *Pope v. State*, 181 Ala. 19, 61 South. 264; *Pope v. State*, 183 Ala. 61, 63 South. 71. We do not Pilate-like wash our hands of a matter which is within our lawful control. We simply declare that in this case there was evidence upon which, if believed, a rational mind could legally infer the guilt of the defendant of murder in the first degree, and that therefore it was for the jury, and not for the trial court, to say whether or not the defendant was guilty.

2. There is nothing in the contention of defendant that witnesses should not have been allowed to testify to the finding of sorghum seed and peas under a pile of lumber which was across a railroad from the defendant's house and several hundred yards from his house. The opinion rendered on the second appeal indicates that this lumber was in the defendant's back yard.—*Pope v. State*, 174 Ala. 63, 57 South. 245.

The record on this appeal shows that the lumber was not in the defendant's back yard, but that it was located as above stated and on lands not belonging to the defendant. The record on this appeal, however, shows that the defendant was near this pile of lumber at the time of his arrest; that the lumber belonged to the defendant; and that the lumber was, and had been for a considerable period, kept by the defendant at the place where it was piled with the consent, express or implied, of the owner of the lands upon which it was piled

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We think that it is clearly inferable from the evidence that the man who burglarized the ginhouse of the deceased was the man who committed the murder. We also think that it is clearly inferable from the evidence that the burglar drove to and from the scene of the burglary in a one horse vehicle. It is also legally inferable from the evidence that the one horse vehicle was, on the named occasion, drawn by a mule which belonged to the defendant, and which, at the time referred to, was kept on a farm of the defendant, and which farm was about 2½ miles from the house in which the defendant lived. It is also inferable from the evidence that after the homicide the murderer drove this wagon drawn by this mule from the scene of the homicide to or near to the house of the defendant.

The deceased was beaten to death by blows upon the head, and some of the blunt instruments used in the perpetration of the murder had blood, human cuticle, and hair upon them. As bearing upon the question as to whether the defendant was guilty of the murder, it was therefore competent for the state to show that, on the day after the homicide, a pair of shoes, with evidences of blood and flesh upon them (shoes which some of the evidence tended to show were shoes of the defendant), were found secreted under a house upon the defendant's premises, and that, even six weeks afterwards, sorghum seed and peas in a sprouting condition (as sorghum seed and peas similar to those found under the lumber pile were stolen from the ginhouse when it was burglarized) were found secreted under the lumber pile.

Whenever evidence is relevant, no matter how inconclusive it may be, a trial court cannot be put in error for admitting it.—*Pope v. State*, 174 Ala. 63, 57 South. 245.

3. It seems from the record now before us that McClurkin, the deceased, owned a water mill which was

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situated a short distance from his cotton gin. Both the water mill and the cotton gin were operated by McClurkin for the public. McClurkin's residence was about 200 yards from the water mill, and was a little less than that distance from the cotton gin. It also seems that a colored boy, of but little wit, was accustomed to sleep in the water mill. The murder was committed on Monday night, and on the afternoon of that day the defendant went to the water mill with corn and came back with meal. The theory of the state is that, while the defendant went to the mill for the ostensible purpose of having corn ground into meal, his real purpose in going there was to make an examination of the premises for the purpose of later burglarizing them.

While on the premises on Monday afternoon, the defendant was informed that the negro boy who slept in the mill had killed a rattlesnake. Against the objection of the defendant, the state was permitted to prove that, while the defendant was at or near the mill on Monday afternoon, he told the boy who slept in the mill that he "ought not to sleep in the millhouse," saying, at the same time, that a "snake might bite him in the millhouse." This testimony, upon all the previous appeals in this case, has been held to be relevant. If, when the defendant had the conversation with the boy who slept in the mill, he intended to burglarize the ginhouse, it is not unnatural that he would have preferred, that, when the burglary was committed, no one should be in the mill. It may be that on the previous appeals the records may not have disclosed that the mill and the gin were not in the same building, but, if so, that fact cannot affect the relevancy of the evidence, although it may affect its probative force. The man who burglarized the ginhouse did so for the purpose of stealing sorghum seed and cotton seed therefrom. He went there with a wagon

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in order that he might take away the fruits of his burglary. If the defendant, when he was, on Monday afternoon, on McClurkin's premises, made up his mind to come back there that night, break open the ginhouse and carry away, in a wagon, a lot of sorghum seed and cotton seed, then it is at least inferable that he preferred that no one should, on that night, be in the millhouse, a place in ordinary hearing distance. A jury might infer that the defendant thought that this conversation with this ignorant negro-boy of but little wit was calculated to scare him away from the mill that night and thus relieve the contemplated crime of one possible source of discovery. Upon this ground we think that this evidence, however, slight its probative force, was relevant. If the mill had not been in the immediate neighborhood of the ginhouse—if it had been so situated that an occupant of the mill would have been altogether unlikely to have discovered the crime or its perpetrator—then the evidence would have been irrelevant.

The fact that McClurkin and the members of his household slept in a residence which was in hearing distance of the ginhouse does not affect the relevancy of the above testimony. With no one in the mill, chances of discovery of the contemplated burglary, if one was contemplated, were less than if both the mill and the residence were occupied by human beings. Where evidence is pertinent, although it may be, considered alone, weak and inconclusive, it is competent.—*Alsabrooks, et al. v. State*, 52 Ala. 24.

4. During the progress of the trial, certain exceptions were reserved by the defendant to portions of the testimony of a witness Nett Body.

There are, as has been said by this court in its previous discussions of this case, two theories relative to this murder. One theory is that John Body committed the

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murder. McClurkin came to his death very close to John Body's house, and one of the instruments probably used by the murderer in committing the murder was a piece of wood from John Body's woodpile. The evidence of Nett Body, fairly and dispassionately construed, tended to show that, at the time the murder was committed—during the period when the murderer was beating McClurkin to death—John Body was in his room in his house. The evidence tending to show the defendant's guilt was circumstantial. Some of these circumstances were minute and, considered alone, are of little force as evidence. The evidence which tends to show the guilt of Body is also circumstantial. If Body, and not the defendant, is the murderer, circumstances alone tend to establish his guilt. One thing is certain, if Body was in his room at the time McClurkin was murdered, then Body did not strike the blows which caused his death. If Body was in his room at the time indicated, a serious blow is given to the theory of the defendant, and necessarily the theory of the state is correspondingly strengthened. In our opinion, therefore, the evidence of Nett Body, to which the defendant objected, was relevant.

It is true that Nett Body is John Body's mother. It is also true that, when she first testified in the case, John Body was then in jail charged with McClurkin's murder. These facts affect, not the relevancy, but only the value, of Nett Body's testimony.

5. We have above considered all the questions which counsel for the defendant have, in their brief, called to our attention. A careful examination of the record indicates that they have in their briefs directed our attention to every question presented by the record which calls for discussion at our hands. The record fails to show reversible error, and as this case presented, under

[Ex Parte Phillips, in re. Phillips v. The State.]

all the evidence, a case for the determination of a jury, we are helpless to furnish the defendant with another trial. Five juries, in five successive trials, have found the defendant guilty of murder in the first degree, and in each instance the death penalty has been imposed upon the defendant. The last trial, the one from which this appeal was prosecuted, was free from reversible error. The judgment of the trial court sentencing the defendant to death must therefore be affirmed.

Affirmed. All the Justices concur.

Ex Parte Phillips, in re Phillips v. The State.

Arson.

(Decided June 30, 1914. 66 South. 3.)

1. *Witnesses; Impeachment; Predicate.*—Before a witness can be impeached by showing contradictory statements made out of court, his attention must be called to the time and place at which he made them.

2. *Same.*—Where the facts before the trial judge show that the witness knew the time and place where the contradictory statements were made, about which he was being interrogated, and show that he could not have been taken by surprise, but would be afforded ample opportunity to make any explanation desired, a sufficient predicate was laid for the admission of such statement, although the question asked did not fix the place.

3. *Appeal and Error; Court of Appeals; Review by Supreme Court.*—Where the Court of Appeals found as a fact from the record that witness knew the place inquired about, and could not have been taken by surprise, but was afforded ample opportunity to make any desired explanation, such a finding was a finding of fact which will not be reviewed by the Supreme Court.

CERTIORARI to Court of Appeals.

Petition by Julian Phillips for a certiorari to the Court of Appeals to review and revise the judgment and decision of that court affirming the judgment of the lower court in the case of *Julian Phillips v. State*. Writ denied.

[Ex Parte Phillips, in re. Phillips v. The State.]

ERNEST H. HILL and WEIL, STAKELY & VARDAMAN, for appellant. Counsel used the same brief set out on the former appeal in *Phillips v. State*, 11 Ala. App. 168.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. Counsel used same brief set out on the former appeal in *Phillips v. State*, 11 Ala. App. 168.

DE GRAFFENRIED, J.—A witness cannot be impeached by showing contradictory statements made out of court, unless his attention is called to the time and place at which he made them.—*Lewis v. Post & Main*, 1 Ala. 65; *Powell v. State*, 19 Ala. 577; *Nelson v. Iverson*, 24 Ala. 9, 60 Am. Dec. 422; *Southern Railway Co. v. Williams*, 113 Ala. 621, 21 South. 328.

We cite the above cases, not for the purpose of showing authorities in which a well-known rule is announced but because they discuss the rule and give the reasons upon which it is based.

In the instant case the Court of Appeals find, as a *fact*, that when the impeached witness Myers was being interrogated in reference to the statement about which he was contradicted by the witness Mixon, it was evident that Myers *knew* the *place* of the conversation inquired about and which was made the subject of contradiction. If the trial judge saw that Myers knew the place of the alleged contradictory statement, if the trial judge had facts which established *this*, then there was no necessity for fixing the *place* of the alleged contradictory statement in the preliminary question.

"The predicate is sufficiently laid when the attention of the witness is called to the time, place, and circumstances and persons involved, and the statements made; but the rule is not iron-clad (that is, it does not require

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perfect precision as to either). *When it is clear that the witness cannot be taken by surprise, and ample opportunity is afforded to make any explanation desired, the predicate is sufficient to authorize proof of contradictory statements.*"—*Southern Railway Co. v. Williams, supra.*

The opinion of the Court of Appeals fully recognizes the above rule, and, in its opinion on file in this case, that court states, *as a finding of fact* from the bill of exceptions, that, under that part of the rule which we have above italicized, the evidence of which appellant complains was competent. We have steadily refused to review the findings of fact of the Court of Appeals, and for that reason this writ must be denied. The other questions presented to us for review were properly disposed of by the Court of Appeals.

Writ denied. All the Justices concur.

Davis v. The State.

Murder.

(Decided June 30, 1914. 66 South. 67.)

1. *Homicide; Evidence.*—Where it appeared that deceased had made an attack upon defendant about thirty minutes before the killing occurred, the court properly excluded testimony going into details of the previous difficulty, as such testimony did not have a tendency to sustain defendant's plea to self-defense, but did have a tendency to bring into the case collateral matter.

2. *Same; Declarations.*—Where the homicide occurred in a store, evidence that defendant, after having a difficulty with deceased at a mill at which they worked, returned home and informed his wife that he was going to the store to settle his account, was admissible to explain his presence at the store, and to rebut an inference of intent and premeditation; such declaration not being inadmissible because of the fact that it was in the nature of a self-serving declaration.

3. *Same.*—Where the state had introduced evidence to show that defendant dropped a knife near the body of deceased after the killing.

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and defendant claimed that deceased had assaulted him with a knife, a witness for defendant could not testify that another person who had left the country and did not appear at the trial, attempted to induce him to testify that the knife belonged to defendant; such evidence being admissible only for the purpose of impeaching such other person who was not a witness.

4. *Same; Instructions; Burden of Proof.*—The state is not bound to prove that deceased was free from fault in bringing on the fatal encounter, although the jury may believe that a state of facts existed which put upon the state the burden of showing that defendant was in fault.

5. *Same.*—Where there were only two alternative findings possible—that accused killed deceased before the latter made any demonstration, or that deceased made an assault upon defendant with a deadly weapon—instructions on the right of a party to act upon the reasonable appearance of danger, were properly refused.

6. *Same; Self-Defense.*—Ordinarily, a person attacked with murderous intent is not bound to retreat, unless he can do so without increasing his peril, but that rule does not obtain where he provokes the difficulty; hence, where defendant claims that he killed in self-defense, a charge on the duty to retreat which omits the qualification that he could do so without increasing his peril was properly refused.

7. *Same.*—Where a defendant fired the fatal shot as a result in part of sudden passion aroused by a blow, though he entertained malice, the fact of the sudden passion did not reduce the offense to manslaughter.

8. *Same.*—Where the state asserted that defendant went to the store for the purpose of provoking the difficulty, and there killed deceased, the refusal of an instruction that defendant had the right, under the law, to go to the store, was not error.

9. *Charge of Court; Reasonable Doubt.*—A charge asserting that the jury should acquit if there was a probability of defendant's innocence, was properly refused as not being predicated upon the evidence.

10. *Same.*—A charge asserting that if from the evidence there is a probability of defendant's innocence, the jury should find him not guilty, even though it has no reasonable doubt from the evidence that defendant is guilty, is self-contradictory, and properly refused.

11. *Same; Abstract.*—Where there was nothing in the evidence affording an inference that any witness had exhibited at the trial or elsewhere, prejudice or anger against defendant, charges on the right of the jury to disregard the evidence of witnesses exhibiting prejudice or anger, were properly refused as abstract.

12. *Same; Applicability to Evidence.*—It is always proper to refuse charges which are not predicated upon or supported by the evidence.

13. *Appeal and Error; Harmless Error; Evidence.*—The exclusion of evidence of a witness who had known defendant for some time that he never saw defendant use anything but a small pearl handled knife, different from the one found near deceased, was harmless, although erroneous under the particular facts in this case.

(McCellan, Sayre and Somerville, JJ., dissent in part.)

[Davis v. The State.]

APPEAL from Shelby County Court.

Heard before Hon. E. S. LYMAN.

Walter Davis was convicted of murder, and he appeals. Reversed and remanded.

The following charges were refused to defendant:

(2) "If, from the evidence in this case, there is a probability of defendant's innocence, the jury should find him not guilty, even though the jury has no reasonable doubt from the evidence that defendant is guilty."

(3) "If any of the state's witnesses have exhibited prejudice or anger against defendant and satisfied you that they have not testified truly and are not worthy of belief, and you think their testimony should be disregarded, you may disregard it altogether."

(4) "If there is a probability of defendant's innocence, you should acquit him."

(6) "If any of the state's witnesses," etc., as in charge 3.

(13) "If you believe from the evidence that deceased and J. W. Howard were acting in concert, and that the killing was the result of a sudden blow inflicted by Howard, which aroused defendant's sudden action, or if they have a reasonable doubt as to whether the killing was the result of passion, suddenly aroused by the blow on defendant by said Howard, if they believe that deceased and Howard were acting in concert, you can't find defendant guilty of murder."

(19) "If defendant, Walter Davis, shot Jim Watters under a bona fide belief that he was in impending danger of life or limb, and that he had, under all the circumstances, reasonable cause to believe that he was in imminent danger at the time the shooting was done, it would be immaterial whether there was danger or not."

(27) "The law does not impose, upon a person attacked with murderous intent, the duty to retreat unless the

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evidence in the case shows the person could have retreated without increasing his peril."

(30) "It is not necessary, under the evidence in this case, that defendant should have actually been in danger of death or great bodily harm at the time he killed Jim Watters, or that retreat would have increased his danger, in order for him to have been justified in shooting Jim Watters."

(33) "If the killing was the consequence of passion suddenly aroused by a blow given, they cannot convict defendant of murder."

(36) Same as 30, and adds: "He had a right to act on the appearance of things at the time, taken in the light of all the evidence, and if the circumstances attending the killing are such as to justify a reasonable man in the belief that he was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believed such to be the case, then he had a right to shoot Jim Watters in his own defense, although, as a matter of fact, he was not in actual danger, and retreat would not have endangered his personal safety; and, if the jury believe that defendant acted under such conditions and circumstances above set out, the burden of showing that he was not free from fault in bringing on the difficulty was on the state, and, if not shown, you should acquit defendant."

(37) Practically the same as 36.

(38) "It is not necessary, under the evidence in this case, that defendant should have been actually in danger of death or great bodily harm at the time he killed deceased. He had the right to act on the appearance of same at the time, taken in the light of all the evidence, and he had the right to interpret the conduct of deceased in the light of any threats that the evidence proves de-

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ceased to have made against him. If the circumstances of the killing were such as to justify a reasonable man in the belief that he was in danger of great bodily harm" (and concluding as does charge 36).

(A) "The burden is on the state to prove to you, beyond all reasonable doubt, that defendant was at fault in bringing on the difficulty, and that deceased was not at fault in bringing on said difficulty, provided that defendant has reasonably satisfied you from the evidence that deceased was making an effort to get at defendant with a knife, and defendant honestly believed that his life was in danger, and he shot under such belief, and there was no reasonable mode of escape for defendant without increasing his peril."

(E) "This defendant had a right, under the law to go to the store where the fatal difficulty occurred."

RIDDLE & ELLIS, for appellant. The court erred in excluding the details of the former difficulty, as it was near in point of time and shed light on the question as to who was the aggressor.—*Watts v. State*, 59 South. 270. A person going to a particular place may have evidence of his statement explanatory of the object he had in view in so setting out.—*Kilgore v. Stanley*, 90 Ala. 523; *Pitts v. Burroughs*, 6 Ala. 733. If there is a probability that defendant is innocent under the evidence, he should not be convicted.—*Bones v. State*, 23 South. 138; *Croft v. State*, 95 Ala. 3. The jury may disregard the testimony of witnesses who exhibit prejudice or anger against defendant.—*Adams v. State*, 57 South. 591; *Jackson v. State*, 57 South. 596; *Naugher v. State*, 60 South. 458. The charges on self-defense should have been given.—*Jackson v. State*, 77 Ala. 18; *Green v. State*, 143 Ala. 2; *Blewett v. State*, 151 Ala. 41; *Snyder v. State*, 145 Ala. 43.

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R. C. BRICKELL, Attorney General and T. H. SEAY, Assistant Attorney General, for the State.

SAYRE, J.—Defendant killed one Watters by shooting him with a pistol, was convicted of murder in the first degree, and sentenced to imprisonment for life.

Defendant admitted the killing, which indeed had been committed in a store at Siluria and had been witnessed by a number of people, and sought to excuse himself on the ground of self-defense.

Defendant was allowed to show that about 30 minutes before the killing, and while he and deceased were waiting to be paid off at the mills in the neighborhood where they worked together, deceased had made an attack upon him and threatened him with a mill hammer. This testimony, going to show the fact and general nature of a previous difficulty, was not objectionable to the state, for one tendency of it was to prove defendant's motive and malice; it may also have served a proper purpose for defendant, if the jury had been in doubt whether to accept his version of the circumstances of the encounter (*Beasley v. State*, 181 Ala. 28, 61 South. 259), but, when defendant sought to go further into proof of the details and merits of the previous occasion, the state's objections were properly sustained, on the grounds of administrative necessity, and because the merits of defendant's plea were not dependent upon the inquiry whether defendant or deceased had been at fault in the previous difficulty (1 Mayf. Dig. §§ 331, 377, et seq.). If the evidence of this previous difficulty may have served any legitimate purpose of defendant in the way of showing that the deceased was the aggressor on the occasion of the fatal encounter, he had the full benefit of all he was entitled to prove in that connection.—*Watts v. State*, 177 Ala. 24, 59 South. 270.

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Counsel for the defendant, examining defendant as a witness in his own behalf, proposed to have him testify that on setting out from his home to the store, before the killing, but after the difficulty at the mill, he had said to his wife that he was going down to the store to settle his account. Defendant cites a line of cases beginning with *Pitts v. Burroughs*, 6 Ala. 733, and ending with *Mador v. State*, 159 Ala. 53, 48 South. 689, to show that there was error in the court's exclusion of this evidence of the witness' previous declaration under the circumstances stated. The rule outlined in these cases is that declarations made by the actor or party concerned, at the time an act is done, and which explain the *quo animo* and design of the performance, may, whenever the nature of the act is called in question, be given in evidence as part of the *res gestæ*. Another rule of evidence is stated in *Williams v. State*, 105 Ala. 96, 17 South. 86, in this language: "Exculpatory declarations of a defendant charged with crime are never admissible in his favor, unless they are within and constitute a part of the *res gestæ* of some situation, condition, or fact which is itself relevant to the issue of guilt vel non."

Evidence of defendant's declaration under the circumstances and to the effect stated above was offered on the theory, we suppose, that the fact that defendant went from his home to the store where the killing was done was relevant to the issue of guilt vel non, and that the declaration itself tended to exculpate accused by rebutting the inference of malice or a design to take the life of deceased, formed before the act. If there had been any issue as to whether defendant was at the store and committed the deed charged against him, the fact of his declaration upon setting out that he intended to go to the store would have been an inculpatory admission provable against defendant, as all such admissions are.

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But defendant did not deny his presence at the store, nor, as we have already stated, did he deny the killing; he claimed only that he acted in self-defense. In this state of the case, so much of the declaration as indicated that he was going to the store was of no consequence whatever. It was important, however, that defendant's mental attitude towards deceased at the time of the act charged should be known, and to this end competent evidence of his previous attitude towards deceased, whether hostile or friendly, was admissible on the theory of the probable continuity of mental state for a reasonable length of time. So the only question of any interest to the parties, in view of the defense interposed, is whether defendant's declaration that he intended to settle his account at the store had any tendency to establish his mental attitude towards deceased then or later, or to shed light upon the mental constituents of his act in killing deceased. Whether defendant intended or not to settle his account at the store was of course of no consequence in this connection, for his intention in that respect did not include or exclude, necessarily or inferentially, any intention whatever with respect to deceased. The mere fact that defendant was present at the store before the homicide, or this fact, in connection with his previously expressed intention to settle his account, in view of the issues raised by the only defense interposed, was not a circumstance of any consequence, did not tend in the slightest to show that defendant took the life of deceased only after he had been driven to the wall by an attack upon him, for that depended upon what deceased did at the time. Nor did these facts or either of them tend at all to rebut the presumption of malice drawn by the law from the confessedly intentional subsequent use of a deadly weapon, nor even to affect the grade of the murder committed by way of tending to show that the act

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was done without premeditation or deliberation, for the law of this state is that if, before striking the fatal blow, the slayer has time to think, though it be only an instant, even a single moment, and does think, and, after having thought, strikes the blow as the result of an intention to kill, produced by even such momentary operation of the mind, there is deliberation and premeditation, within the meaning of the statute defining murder in the first degree.—*Daughdrill v. State*, 113 Ala. 7, 21 South. 378. It seems reasonably clear, therefore, in the circumstances of this case, that defendant's declaration, made upon setting out from home, to the effect that he intended to settle his account at the store, shed no more light upon issues of fact controverted at the trial, no more illustrated what did actually occur at the store, than would any other casual, insignificant, and unrelated remark, and that this consideration is enough to take the case without the controlling influence of that line of cases cited by defendant to the point under discussion.

If, however, the declaration which defendant proposed to prove be held to shed light upon the circumstances of the homicide committed subsequently and after a distinct interval, as the majority of the court holds, then it was self-serving and was properly excluded on the authority of *Jones v. State*, 174 Ala. 53, 57 South. 31. It is a general rule of broad application that self-serving declarations are not admissible in behalf of the declarant.—*Martin v. Williams*, 18 Ala. 190; *Oliver v. State*, 17 Ala. 587. The propriety of applying the general rule of exclusion in this case is strongly indicated by the undisputed fact that, shortly before the declaration in question, defendant and deceased had been engaged in a serious difficulty, so that the declaration of intention, so far as it may possibly be held to relate to

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deceased, had no element of spontaneity and was under grave suspicion of having been manufactured for the occasion. In the opinion of the writer, concurred in by McCLELLAN and SOMERVILLE, JJ., the evidence was rejected without error. However, the majority of the court, consisting of ANDERSON, C. J., MAYFIELD, DE GRAFFENRIED, and GARDNER, JJ., holds there was error on the authority of the cases cited by appellant. They also hold that *Jones v. State, supra*, should be overruled.

Defendant testified that deceased had first assaulted him with a knife, and that one Howard had "taken out after him" and shoved him as if to help deceased. A knife was found near the body of deceased as he lay unconscious upon the floor where he fell after receiving fatal wounds at the hand of defendant. A witness for the state testified that defendant had returned to the spot and dropped the knife there. The testimony of Jeff Williams, a witness for defendant, to the effect that Howard had asked him to testify that the knife belonged to the defendant, which he refused to do, could have been admissible only to impeach Howard by showing his interest and activity in the prosecution. But Howard did not testify, and so was not the subject of impeachment. It was shown that he had gone to parts unknown.

The probative force of the testimony of Jeff Williams that, at some indefinite time in the past and for some indefinite period, he had worked the same loom, or in the same room, with defendant, and that the only knife he ever saw defendant with was a small pearl-handled knife, in view of the whole evidence, which we have not thought it necessary to state, was negligible, and we do not find reversible error in its exclusion.

Charge 2, refused to defendant, was well refused because it was self-contradictory.

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Charges 3 and 6 were well refused because abstract. There is nothing in the evidence stated in the record to afford an inference that any witness exhibited at the trial or elsewhere prejudice or anger against defendant. Herein the case is to be distinguished from *Adams v. State*, 175 Ala. 8, 57 South. 591.

Charge 4 was well refused because it did not predicate the probability of innocence which would require an acquittal as arising out of the evidence. The substance of the charge with this needed amendment was given to the jury in charge 26.

The burden was not on the state, in the situation described in charge 10, to prove that deceased was free from fault in bringing on the fatal encounter, though it was open to the jury, upon belief of defendant's testimony, to find a state of facts which put upon the prosecution that burden in respect of defendant's fault.

We find no evidence in the record calling for a statement of the law proposed by charge 13. The charge was well refused because abstract.

The evidence did not present a case calling for a statement of the doctrine as to the right of accused to act upon the reasonable appearance of danger to life or limb. There were but two alternative findings possible, either defendant killed deceased without any demonstration of offense or defense, on the part of deceased, or deceased first made an actual assault upon defendant with a deadly weapon, as defendant testified. The case involved no question as to the reasonable appearance of a danger that did not in fact exist. In other words, charge 19 was abstract. This charge was approved in *Snyder v. State*, 145 Ala. 33, 40 South. 978, cited by defendant. The report of the case does not contain a statement of the relevant facts. The decision was based upon *Kennedy v. State*, 140 Ala. 1, 37 South. 90. We

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presume, therefore, that there was in the *Snyder Case* some evidence of a hostile demonstration, short of an actual assault, as there was in *Kennedy v. State, supra*, where the record shows that deceased "seemed to draw" his pistol. These observations apply to a part of charges 36, 37, and 38.

Charge 27 asserts an abstract proposition, applicable to all cases where a person is attacked with murderous intent. But the proposition does not hold good in all cases. If a person provokes a difficulty, in the course of which his adversary makes a murderous attack upon him, he is not entitled to the benefit of the limitation upon the doctrine of retreat stated in the charge.—*Storey v. State*, 71 Ala. 329; *Abernathy v. State*, 129 Ala. 85, 29 South. 844.

Charge 30 combined the faults we have found in charges 19 and 27.

Charge 33 was properly refused. Defendant may have fired the fatal shot as the consequence, in part, of sudden passion aroused by a blow and yet have entertained malice. When this is the case, the homicide, otherwise indefensible murder, is not reduced to manslaughter by reason of the passion.—*Martin v. State*, 119 Ala. 1, 25 South. 255.

The state was not required to show that deceased was free from fault in bringing on the difficulty, as we have already pointed out. Charge A, as it is written in the record, was faulty because it asserts the contrary, and was for this reason refused without error.

Charge E was misleading. Defendant, under the evidence, was not entitled to the bald statement that he had a right to go to the store where the fatal difficulty occurred, because the state's evidence tended to show that he knew the deceased was there and went there with his mind bent upon mischief. In view of this tendency

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of the evidence, the charge was misleading and defective because it did not hypothesize defendant's innocence of unlawful purpose in going to the store.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD, DE GRAFFENRIED, and GARDNER, JJ., concur. MCCLELLAN, SOMERVILLE, and SAYRE, JJ., dissent.

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Murder.

(Decided June 30, 1914. 66 South. 81.)

1. *Jury; Competency.*—While the jury law (Acts 1909, p. 305), supersedes former laws for the organization of jurors and prescribes the qualifications of persons whose names are to be placed on the jury roll and in the jury box, it does not declare who are competent for the trial of a particular case, nor does it change the pre-existing law on that subject.

2. *Same.*—A juror who will not inflict the death penalty on any evidence, or on circumstantial evidence alone, is not a qualified juror to sit in a case where the charge is murder in the first degree, and the court may reject such juror on its own motion.

3. *Same; Qualification; Statutory Provision.*—The jury law of 1909 abrogates the former system of challenging jurors by the parties, and the trial judge must determine not only whether the veniremen possess the general qualifications, but whether they are competent for the particular case, and it is immaterial whether the court rejects an unfit veniremen on its own motion, or on the suggestion of another, or that incompetent jurors are not discovered by the preliminary inquiries before the lists are made up, provided they are discovered at any time before the striking is begun, in which case, the court should strike them of its own motion.

4. *Homicide; Self-Defense.*—Where a defendant was in actual imminent peril of life, or of suffering grievous bodily harm, when he shot deceased, and the other conditions requisite to the exercise of the right of self-defense were present, an honest belief on the part of defendant in his peril was immaterial, and an inquiry as to its existence will not be made, since the requirement of honest belief is applicable only to reasonably apparent peril.

5. *Same.*—Where the circumstances attending the homicide were such as to justify defendant in a reasonable belief that he was in danger of death or great bodily harm, and that he could not retreat

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without increasing his peril, and he honestly believed such to be the case, he could shoot in self-defense, although as a matter of fact, he was not in actual danger, and a retreat would not have increased his peril, and the burden of showing that defendant was not free from fault in bringing on the difficulty is on the state.

APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

William O'Rear was tried for murder in the first degree, convicted of murder in the second degree, and he appeals. Reversed and remanded.

Of the 89 special veniremen who answered at the trial 4 were excused for cause shown, and the remaining 85 being held competent jurors, were placed on a list a copy of which was duly served on defendant. Thereafter the court allowed the state, over the seasonable objection of defendant, to challenge 4 of the veniremen thus listed because of their disbelief in capital punishment, or of conviction on circumstantial evidence, and these 4 veniremen were excused by the court because of such disbelief, and defendant duly excepted. Defendant's evidence tended to make out a case of self-defense, and tended to show that at the time he shot and killed deceased, defendant was in actual and imminent peril of his life.

The trial court at the request of the state gave the following charge:

(1) Self-defense cannot be set up in this case by defendant if you find that the facts were not such as to warrant defendant in the reasonable belief that he was in imminent peril; and, if you are convinced that defendant did not entertain the honest belief that he was in imminent peril at the time of the difficulty, the defendant cannot plead self-defense in this case.

The following charge was refused to defendant:

(5) It is not necessary under the evidence in this case that defendant should have been actually in danger of

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death or great bodily harm at the time he killed deceased, or that retreating would have really increased his peril in order for him to have been justified in shooting deceased; he had the right to act on the appearance of things. If the circumstances attending the killing are such as to justify a reasonable belief that defendant was in danger of great bodily harm or death, and that he could not have retreated without adding to his peril, and he honestly believed such to be the case, then he had a right to shoot deceased in his own defense; although, as a matter of fact, he was not in actual danger, and retreat would not have endangered his personal safety. And if the jury believe that defendant acted under such conditions and circumstances as above set out, the burden of showing that he was not free from fault in bringing on the difficulty is on the state, and, if not shown, they should acquit defendant.

BROWN & GRIFFITH, for appellant. The present jury law found in Acts 1909, p. 305, is the sole law of Alabama on this subject, and repeals sections 7271 to 7281, inclusive, of the Code. The right to strike is, therefore, clearly a substitute to the right of challenge.—*Howard v. State*, 63 South. 753; *Spivey v. State*, 172 Ala. 393; *Patterson v. State*, 171 Ala. 6; *Gilmore v. State*, 126 Ala. 33. The right here complained of is not within the letter or spirit of rule 45.—Authorities supra. The court was in error in admitting the particulars of the former difficulty.—*Patterson v. State*, 156 Ala. 66; *Robertson v. State*, 155 Ala. 2; *Stallings v. State*, 142 Ala. 112; *McAnally v. State*, 74 Ala. 9. An aggressor may revive his right of self-defense by retiring in good faith from the conflict and announcing his desire for peace.—*Stillwell v. State*, 107 Ala. 16; *Bostwick v. State*, 94 Ala. 47; *Parker v. State*, 88 Ala. 4. The doctrine of real ne-

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cessity is founded upon the actual existing conditions of the parties, and not upon the mental state of the slayer as to apparent necessity.—*Jackson v. State*, 77 Ala. 18; *Wilson v. State*, 140 Ala. 48; *Blewett v. State*, 151 Ala. 41. The charges of defendant being in explanation of the charges given for the state and asserting correct propositions of law, should have been given.—Authorities *supra*.

R. C. BRICKELL, Attorney General and T. H. SEAY, Assistant Attorney General, for the State. That the court did not err relative to the jury, has been passed upon too many times to require argument here. There was no error in admitting the coat worn by deceased at the time of the difficulty.—*Holley v. State*, 75 Ala. 14. The evidence admitted constituted a part of the *res gestæ* of the main difficulty in which the killing occurred.—*Jackson v. State*, 53 Ala. 472; *Smith v. The State*, 53 Ala. 486. The charges given for the state were free from error.—*Hinson v. State*, 112 Ala. 41; *Miller v. State*, 107 Ala. 40. Therefore the charges requested by defendant explanatory thereof were properly refused.

SOMERVILLE, J.—While the new jury law supercedes all former laws regulating the organization of juries (Special Sess. Acts 1909, p. 305, § 32), and prescribes certain qualifications for the persons whose names are to be placed on the jury roll and in the jury box (section 11), nevertheless, it does not undertake to declare who are competent persons for the trial of particular cases, and does not, in this respect, change pre-existing law.

A person who will not inflict the death penalty upon any evidence, or upon circumstantial evidence alone, is not a competent and qualified juror in a first degree

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murder case, and it is the power and duty of the court, of its own motion, to reject such a venireman.—*Griffin v. State*, 90 Ala. 596, 599, 8 South. 670, and cases cited.

Section 32 of the jury law (page 319) provides: "On the day set for the trial, if the cause is ready for trial, the court must inquire into and, pass upon the qualifications of all the persons who appear in court in response to the summons to serve as jurors, and shall cause the names of all those whom the court may hold to be competent jurors to try the defendant or defendants to be placed on lists and if there is only one defendant on trial shall require the solicitor to strike off one name and the defendant to strike off two names, * * * and they shall in this manner continue to strike names from the list until only twelve names remain thereon."

It is, of course, perfectly clear that the former system of challenging jurors by the parties is abrogated and superseded by the method now prescribed, as above quoted. It is equally clear, however, that the trial judge must determine, not only whether the veniremen possess the general qualifications prescribed by the jury law for jury service *in general*, but also whether they are competent jurors for the trial of *the case in hand*. This being the judge's duty, it is of no consequence whether he rejects an unfit venireman *ex mero motu*, or upon the suggestion of another. Justice is not concerned with the source or form of the information which reveals incompetence, but only with its resulting elimination from the jury box. Nor is it material that incompetents are not discovered by the preliminary inquiry before the lists are made up. If they be discovered at any time, at least before striking is begun, they should be stricken by the court. The action of the court in striking the names of the four veniremen who were shown to be incompetent for the trial of this case, was free from error.

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If the defendant was in *actual* imminent peril of his life, or of serious bodily harm, at the time he shot deceased, and the other conditions requisite to the exercise of the right of self-defense were present, his honest belief in such peril is not material, and the law will make no inquiry as to its existence. The requirement of honest belief is applicable only to a state of *reasonably apparent* peril.—*Jackson v. State*, 77 Ala. 18; *Dolan v. State*, 81 Ala. 17, 1 South. 707; 21 Cyc. 813b; 21 Cyc. 815c, and cases cited.

There was evidence from which the jury might have found that defendant was in *actual* imminent peril, and charge 1, given for the state, was erroneous in predicating the right of self-defense solely upon defendant's honest belief as to such peril. The charge would have been correct if conditioned upon a finding that defendant's peril was not real, but reasonably apparent only.

Charge 5, refused to defendant, correctly states the law of self-defense, and has been several times approved.—*Bluitt's Case*, 161 Ala. 17, 49 South. 854 (charge 13); *Bluett v. State*, 151 Ala. 41, 51, 44 South. 84 (charge 26). Its refusal was error.

We find no error in the giving or refusal of other charges.

For the errors noted, the judgment will be reversed and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ.,
concur.

[*Ex Parte Dudley, et al., in re. Dudley, et al. v. The State.*]

***Ex Parte Dudley, et al., in re Dudley, et al. v.
The State.***

Forgery.

(Decided June 30, 1914. 66 South. 91.)

CERTIORARI to Court of Appeals.

Joe R. Dudley and others were convicted for forgery, and on appeal to the Court of Appeals, such judgment was affirmed. They bring petition for certiorari to the Court of Appeals to review and revise the judgment of said court. Writ denied.

For report of this case see 10 Ala. App. 130, 64 South. 534.

PITTS & LEVA, and PARTRIDGE & HOBBS, for appellant. Counsel use the same brief and authorities as will be found set out in the report of this case in 10 Ala. App. 130.

R. C. BRICKELL, Attorney General and W. L. MARTIN, Assistant Attorney General, for the State. Counsel use same brief and authorities as will be found set out in the report of this case in 10 Ala. App. 130.

MAYFIELD, J.—The majority of the court are of opinion that the prayer of the petition should be denied, on the authority of, and for the reasons stated in, the opinion of WALKER, P. J., in the decision of this case in the Court of Appeals.—*Joe R. Dudley, et al. v. State of Alabama*, 10 Ala. App. 130, 64 South. 534. The writer, however, dissents from this conclusion, and submits the following statement of his individual views: Is an ap-

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plication for a life insurance policy the subject of forgery? This is the main question involved on this application for certiorari to the Court of Appeals. The trial court and the Court of Appeals answered the question in the affirmative. The Court of Appeals, per WALKER, P. J., delivered a strong opinion in support of the conclusion reached by the trial court and the Court of Appeals; but I am not able to concur in their conclusion.

It is certain that an application for a life insurance policy is not one of the many writings mentioned in our statute as being the subject of forgery. If it is the subject of forgery, it was so under the common law, or it is embraced within one or the other of the two phrases, "or other instrument, being or purporting to be the act of another, by which any right or interest in property is, or purports to be transferred, conveyed, or in any way changed or affected," and "any instrument in writing, being or purporting to be the act of another." Of course these phrases are susceptible of a construction broad enough to include the application in question, but they are each preceded and followed by words which restrict their legislative meaning. The doctrine of *ejusdem generis* must be, and has heretofore been, applied to these phrases. This doctrine restricts and confines general terms to the particular kind of things mentioned in the special terms to which these general terms refer. The doctrine is that where an enumeration of specified things is followed by some general word or phrase, such general word or phrase is to be held to refer to things of the same kind as those things specified. The general terms are not to be rejected entirely, but to be restricted to cases of the same kind as those expressly enumerated. Like all other rules of construction, it is intended to carry out, and not to defeat, the legislative intent. With-

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out this rule of construction, the last phrase above quoted would include all written instruments of whatever kind or character; whereas, it is certain that such was not the legislative intent. If this phrase in question includes all written instruments, why enumerate any, or why put qualifications upon any of those enumerated?

The phrases above quoted have been in our statutes as they now appear, even as to punctuation, since the Code of 1886, which was a codification of an act of January 27, 1883 (Acts 1882-83, p. 33), and the statute has been repeatedly construed by this court, by restricting the meaning of these general terms; and the statute as thus construed has been repeatedly readopted by the Legislature. This statute, in its present exact form, so far as the particular quoted phrases are concerned, was first construed in the case of *Fomby v. State*, 87 Ala. 36, 6 South. 271. It was there held not to include any or all written instruments, but to be limited to those instruments which purport to create, discharge, or qualify, "pecuniary liability," or which show on their face that another person may be injured thereby. In that case the court said: "The instrument, for forging which the defendant was convicted, is set forth in the indictment in hæc verba. On its face, so far as it can be deciphered, it does not purport to create a pecuniary liability on another, nor does it show that another might be injured by it. It is not apparent, that, if genuine, it would operate as the basis of another person's liability. It is uncertain, and some of the words and characters used are so obscure and unintelligible that its meaning and vicious capacity cannot be ascertained from the writing as set forth in the indictment, nor what effect, if any, it should have. In such case, the extrinsic facts connected with a forged instrument should be averred so that the court may see its capacity to create a liability, or to effect a

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fraud. No extrinsic facts are averred, which show or tend to show its vicious capacity, nor is its apparent obscurity explained or removed by innuendo or otherwise."

This same statute was again construed in *Williams' Case*, 90 Ala. 649, 8 South. 825, and held not to embrace all or any written instruments. In that case the written instrument was set out in the indictment, and purported to be a waiver by a landlord of statutory lien on the tenant's crop; but the court held that on its face alone it was not an instrument included in the statute. The opinion in that case was rendered by STONE, C. J., and as the opinion is short, but clear and conclusive, we will here quote it, as follows: "Certain writings—a promissory note, or bill of exchange, for illustration—import on their face the creation of a pecuniary liability. So of many other written instruments, if they import legal validity. That is, if the writing shows on its face, without reference to extrinsic facts, that, if genuine, it creates, discharges, increases, or diminishes a money liability, or transfers or incumbers property, or surrenders or impairs an existing valid claim to or lien on property, then the false making of such written instrument, with intent to defraud, is, without more, forgery, and will justify a conviction of that grave offense. To fall within the rule, however, which dispenses with the averment of extrinsic facts, the writing itself must show that, if genuine, it affects some existing property right, or legal liability; for, otherwise, it fails to show its false making or utterance could defraud any one. There must be both the intention and power to defraud, or the legal offense is not committed. This principle rests on the soundest reason, and the highest authority.—*Dixon v. State*, 81 Ala. 61 [1 South. 69]; 2 Bish. Cr. Law (7th Ed.) § 545.

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"The indictment in this case charges that Lewis, whose name it avers was forged, was the landlord of defendant, and, as such, had a lien on the crop grown on the rented premises, for any advances he had made to Jackson, or might make to him. The law creates the lien, if the relation of landlord and tenant existed, and if advances were made.—*Cockburn v. Watkins*, 76 Ala. 484. But, unless advances were made, there was no lien in fact; and a certificate that no claim or lien existed, other than that for land and mule rent, though forged, could not injure or defraud any one, and legal forgery could not be predicated of it. To make the indictment sufficient, it should have averred that Lewis had made advances to Jackson—such advances as the statute declares give him a lien.—Code of 1886, § 3056. The indictment is insufficient, and the demurrer to it should have been sustained."

In the case of *Burden v. State*, 120 Ala. 388, 25 South. 190, 74 Am. St. Rep. 37, the statute was again construed. It appears that on that appeal the Attorney General made the point that the statute expressly made "any instrument or writing being or purporting to be the act of another," the subject of forgery; but the court held otherwise, and followed the rule of construction announced in *Williams' Case*, *supra*. The opinion in *Burden's Case* was by McCLELLAN, C. J., and he said: "It may be that a writing in the following words, viz.: 'Mr. Holmes, Selma, Ala. Dear Sir: The value of this chain is \$10.00 (Ten)'—is the subject of forgery under certain circumstances extrinsic to the paper itself. Even this we do not decide, however, but it is most clear that on its face this writing, by whomsoever signed or purporting to be signed, does not create, discharge, increase, or diminish a money liability, or transfer or incumber property, or release or impair an existing claim to or

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lien upon property; and if extrinsic facts exist which, taken in connection with the paper, impart to it a capacity to injure or defraud, they should have been averred in the indictment. No such facts are alleged in this indictment, and therefore neither of its counts charge any offense.—*Rembert v. State*, 53 Ala. 467 [25 Am. Rep. 639]; *Dixon v. State*, 81 Ala. 61 [1 South. 69]; *Williams v. State*, 90 Ala. 649 [8 South. 825].

“The construction put upon the words ‘or any instrument or writing, being or purporting to be the act of another,’ in section 4720 of the Code, would lead to this, that if a man signed the name of another to a statement that the earth is round, or that the moon is made of green cheese, or other like entirely innocuous assertion, by means of which there is no possibility of any person being injured or defrauded, he would be guilty of forgery. The statute is not open to such interpretation, we think; and we reiterate with respect to the present form of the provision what has been many times declared by this court. A writing to be the subject of forgery must, either upon its face or by reason of attendant circumstances, have upon the assumption of its genuineness a capacity to injure or defraud.”

The case relied upon in the trial court was *Murphy v. State*, 118 Ala. 137, 23 South. 719, which held that a decree of divorce was a subject of forgery. This is not conclusive or even persuasive that an application for a life insurance policy is the subject of forgery, for the reason that a judicial record at common law was the subject of forgery, and a decree of divorce is a judicial record. Mr. Bishop's definition of forgery is quoted in the opinion in *Murphy's Case*, 118 Ala. 137-139, 23 South. 719 (as frequently done in this court), and is as follows: “Forgery is the false making, or materially altering, with intent to defraud of any writing which, if genuine, might

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apparently be of legal efficacy, or the foundation of a legal liability.—2 Bish. Cr. Law, § 495. The principal point of construction is: That the instrument must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity, or, in other words must be legally capable of effecting a fraud.”—Id., § 503; *Rembert v. State*, 53 Ala. 467, 25 Am. Rep. 639; *Dixon v. State*, 81 Ala. 61, 1 South. 69.

Mr. Bishop, in speaking of records being the subject of forgery, says: “If the forging of writings prejudicial to individuals is indictable a fortiori, it may be when prejudicial to many individuals, or the public. Indeed, this is the kind of common-law forgery mostly spoken of in the older books. Hawkins mentions as examples: ‘Falsely and fraudulently making or altering any matter of record, or any other authentic matter of a public nature; as a parish register,’ or ‘privy seal, or a license from the Barons of Exchequer to compound a debt, or a certificate of holy orders, or a protection from a parliament man.’ We may add, the entry of a marriage in a register, which, indeed, is substantially one of Hawkins’ illustrations. Therefore the counterfeiting or altering of any judicial process is forgery; as, for instance, a writ. So forgery may be committed by writing falsely a pretended order, as from a magistrate to a jailer, to discharge a prisoner because of bail having been given.”—Cr. Law, § 531, pp. 300, 301.

So as stated in the opinion in *Murphy’s Case*, the decree altered in that case was the subject of forgery at common law, and did not need the statute to make it so.

“A false writing directed ‘to any railroad superintendent,’ stating that ‘the bearer has been employed,’ etc., and ‘any courtesies shown him will be duly appreciated, and reciprocated should opportunity offer,’ is not in-

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dictable as a forgery, being of no legal validity.”—2 Bish. Cr. Law, § 534, p. 302.

The author last cited also says that it is a familiar doctrine, that a mere naked promise, no consideration appearing, creates no liability, and is not the subject of forgery. The writing, to be on its face the subject of forgery, must be such as would, if genuine, be apparently of some legal efficacy. A writing merely affirming that certain persons are solvent and able to pay a note to which their names are attached as makers is not the subject of forgery.—*State v. Givins*, 5 Ala. 747.

Where the instrument on its face is complete, and imposes a liability, and especially one which is mentioned in the statute, it is not necessary that it aver extrinsic facts to show its validity, or that another might be injured by the forgery thereof.—*Shelton's Case*, 143 Ala. 98, 39 South. 377. But where the instrument on its face does not impose, create, discharge, or diminish any liability, nor transfer or incumber property nor release, impair, or affect any existing claim to or lien upon property, the extrinsic facts must be averred which, taken in connection with the instrument, impart to it capacity to injure or defraud; and without such extrinsic facts the instrument is bad on demurrer.—*Burden v. State*, *supra*.

The application for a life insurance policy, declared on in this case as a subject of forgery, affects no existing property rights, or legal liability, and therefore, on its face, fails to show that the false making or altering of it could defraud any one.—90 Ala. 650, 8 South. 825. The application is what its name imports—a mere request or solicitation for a contract of insurance in accordance with the conditions and specifications mentioned in the policy. It does not, of itself, purport to bind any one to do or not to do anything. It is only in the

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event the policy is issued or the contract of insurance made that any of the provisions, stipulations, or conditions of the application become binding. Until the policy is issued, the application is a mere request or solicitation for insurance. Standing alone, the application is not a contract, and by its very terms it is not to become binding until the contract of insurance is made; then, and not until then, do any of its provisions, specifications, or representations become binding on the person making the application.

The exact question was before the Supreme Court of Massachusetts in the case of *Commonwealth v. Dunleay*, 157 Mass. 386, 32 N. E. 356, and the court there said:

"The paper writing which the defendant is alleged to have uttered and published, knowing the same to be 'false, forged, and counterfeit, is not one of those enumerated in Pub. Sts. c. 204, § 1. This statute does not, however, supersede the common law; *Commonwealth v. Ayer*, 3 Cush. [Mass.] 150; *Commonwealth v. Hinds*, 101 Mass. 209, 210; and the principal question in the case is whether the indictment sufficiently sets forth a forgery at common law. In *Commonwealth v. Hinds*, it was said by this court, 'In order to maintain an indictment for forgery at common law, it must appear, not only that there has been a false making of a written instrument, for the purpose of fraud or deceit, but also that the forged instrument is of such a description that it might defraud or deceive, if used with that intent,' and that, 'If the fraudulent character of the forged instrument is not manifest on its face, this deficiency should be supplied by such averments as to extrinsic matter as would enable the court judicially to see that it has such a tendency.' See, also, *Commonwealth v. Ray*, 3 Gray [Mass.] 441. In the case at bar, the instrument set forth as forged is an application for a policy of in-

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surance. It is not a contract, and does not purport to be one. The use which was intended to be made of it does not appear, nor 'how it could have been used to the benefit of the defendant or the prejudice of anybody else. * * * The mere possibility that it might be used, in some way which can only be surmised, for some undisclosed fraudulent purpose, is not enough to maintain the indictment.'—101 Mass. 210, 211. The indictment, therefore, is insufficient."

That court said that the application was not included within the Massachusetts statute, which statute was quite as broad as ours, and even enumerated an "insurance policy" as one of the subjects of forgery.

The same question was before the Supreme Court of New Hampshire, in the case of *State v. Horan*, 64 N. H. 548, 15 Atl. 20, and that court said: "The indictment charges the defendant with counterfeiting an application for a policy of insurance purporting to be signed by James Jennings. The instrument set out purports to be signed not by James Jennings, but by Kate Kelly, and to be her application for a policy of insurance upon the life of James Jennings. As the name of the applicant in the purport clause of the indictment varies from the name given in the tenor clause, the repugnance is fatal. * * * The indictment is bad also because it does not show on its face that the instrument is one of which forgery can be committed. The statute makes it a crime to counterfeit, among other writings, 'any warrant, order, or request for the payment of money or the delivery of any property or writing of value.'—G. L. c. 276, § 1. The indictment does not allege that the insurance policy requested is either of the writings mentioned in the statute. It should have averred, in formal and appropriate language, that the policy is a writing of value."

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Our statutes do not differentiate the case in hand from the two cases just above quoted, and those cases are from courts of the highest standing, and I think are conclusive of the question, against the sufficiency of the indictment in this case.

A case somewhat similar is that of *Shirk v. People*, 121 Ill. 61, 11 N. E. 888. There the defendant was indicted for forging a writing, the material parts of which are as follows:

“Harvey F. Perkins’

“Marble and Granite Works, Lena, Ill.

“Adline July 17, ’85.

“I have this day bought of H. F. Perkins, marble grave-stone, of the following size (describing it). * * *

“To be delivered and set in Foreston freight office, Ogle Co., Ill., on or about the 5th day of November, 1885, or as soon as convenient thereafter, for which I agree to pay the sum of \$165 on delivery of said monument.”

The statute of Illinois, enumerating the subjects of forgery, contained the phrase, “other instruments in writing.” The court in that case, speaking of the instrument set out, said: “It is in form a contract in writing for the purchase by Waldecker from Perkins of a marble monument, to be delivered on a future day, and paid for on delivery. By the terms of the instrument it was wholly uncertain whether the money would ever become payable. That depended altogether upon whether the monument was put up and tendered at the time and place specified in the instrument. If the statute was intended to extend to a fictitious contract like this, then it would apply to every executory contract where either of the parties bound himself to the other, though upon a mere contingency, for the payment of money or personal property. This cannot be a proper construc-

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tion of the statute. If such was the intention of the Legislature, the language used certainly fails to express it. Contracts like the one under consideration are seldom, if ever, the subject of sale or transfer, like bills, notes, check, etc.; hence it was not thought necessary to protect society from the sale of fictitious contracts which impose a merely contingent obligation to pay money or property. We are clearly of opinion that the indictment under which the defendant was convicted is fatally defective, and that the court therefore erred in overruling defendant's motion to quash it."

The false making of certifications or applications for pensions, bounties, etc., has been held not to be a forgery within the meaning of federal statutes.—*Neall v. United States*, 118 Fed. 699, 56 C. C. A. 31; *United States v. Ah Won* (C. C.) 97 Fed. 494; *United States v. Glasener* (D. C. 81 Fed. 566.

I do not hold that extrinsic facts might not be averred, which together with the application, would constitute its false and fictitious making or utterance forgery; but I hold that on its face, without more, the application is not the subject of forgery, and that no sufficient extrinsic facts are alleged to make the indictment charge the offense of forgery. It may be that the false making and utterance of an application like the one in question may be the first step, or the incipency, of a great fraud, of procuring a policy on the life of a third party, payable to, or for the use and benefit of, the person falsely making the application, and then killing the insured so as to obtain the insurance; and, if such facts were alleged, the case might show that the person so falsely making or uttering the application was guilty of forgery, but no such facts are alleged in this indictment. There was an attempt in some of the counts to allege extrinsic facts, but no one of the counts contained suffi-

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cient allegations to charge the offense of forgery. No one of the counts alleges that an insurance policy was ever issued, and until this was done there was no contract of any kind, and nothing that purported to be a contract. The application on its face does not purport to be a contract; it even excludes the idea of its being a contract—it in terms solicits the making of a contract—and until the contract of insurance is made neither the application nor any of the representations or stipulations therein contained are binding. The application shows on its face that it was never accepted by the insurance company; that is, there appears, as a part of the application, a blank sheet, headed, "Statement. To be Signed by Applicant upon Payment of the Premium or Any Part Thereof." The blanks on this sheet so headed appear never to have been filed in or signed by the applicant or the insurance agent. So the application shows on its face that it never had any binding or legal effect upon any one. It may have been the initial step or act in a great conspiracy to commit a great crime, but, if so, it does not so appear on the face of the application, nor from any extrinsic facts alleged. The mere conclusion that it was made with the intent to defraud and to obtain from the insurance company \$10,000, and that the alleged forgers had no insurable interest in the life of the insured, is not sufficient.

Writ denied. All the Justices concur, except MAY-FIELD, who dissents.

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Tennison v. The State.*Murder.*

(Decided June 30, 1914. Rehearing denied July 25, 1914.)

Jury; Objections; Waiver.—Where the first motion of defendant to quash the venire was not sufficient under the statute, errors in the selection of the special venire were waived, and a defendant cannot, by an objection to being put on trial and a motion to quash on the ground that the court, after fixing by its order the number of the special venire, erred in excusing some of them, thus reducing the number of jurors to a less number than fixed by the order, not made until after the selection of the jury, take advantage of the error.

(Mayfield, J., dissenting.)

APPEAL from Limestone Circuit Court.

Heard before Hon. D. W. SPEAKE.

Fletcher Tennison was convicted of murder and he appeals. Affirmed. For former report of this case see 183 Ala. 1, 62 South. 780.

W. R. WALKER, for appellant. Section 32 of the jury law, Acts, Special Session, 1909, page 319, provides "that the court in a capital case must make an order commanding the sheriff to summon not less than fifty nor more than one hundred persons, including those drawn and summoned on the regular juries for the week set for the trial of the case, and must cause a list of the names specially drawn, and those summoned for the week to be served upon the defendant; and the court is then further required to pass upon the qualification of of the persons who appear in court in response to the summons to serve as jurors, and cause a list of the qualified jurors to be made and from which list the jury is selected." "Where the court by its order designates a certain number of persons as constituting the venire to

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try a capital case, and the record shows that less than that number of persons were furnished as such venire, it results that the defendant is deprived of the venire fixed by the order of the court and contemplated by law, and is such error as will reverse."—Acts S. S. 1909, sec. 32, page 319; *Jackson's Case*, 171 Ala. 38; *Harris' Case*, 172 Ala. 413; *Bailey's Case*, 172 Ala. 418; *Clark's Case*, 57 South. Rep. 1024; *Edgar's Case*, 62 South. Rep. 800; *Fowler's Case*, 63 South. Rep. 40; *Andreus' Case*, 174 Ala. 11. In the case at bar there appears in the record the organization of the jury, and the excusing of the ten summoned, thereby reducing the number of the regular venire by ten; and subsequent to this appears the order setting the day for the hearing, and the order setting the number of jurors at 88. Hence, the record shows the error in the order, just exactly as the court by its own motion said the error appeared in *Jackson's Case*, 171 Ala. 38, *Andreus' Case*, 174 Ala. 11, and *Rudolph's Case*, 172 Ala. 379, and in *Underwood's Case*, 60 South. 842, *Clark's Case*, 3 Ala. App. 5, and in *Seay's Case*, 172 Ala. 382, was no order at all.

R. C. BRICKELL, Attorney General and T. H. SEAY, Assistant Attorney General, for the State.

MAYFIELD, J.—Appellant was indicted, convicted, and sentenced to life imprisonment, for the murder of Arthur Slaton, by shooting him with a gun.

This is the second appeal. Some of the questions raised on this appeal, as to the admission of evidence touching the hearing of voices in the house and the crying of a woman, were presented on the former appeal and decided adversely to appellant; and we now adhere to that decision. There are other questions as to the admissibility of evidence against the accused, which were not presented on the former appeal.

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The state was allowed on this trial, over the objection of the accused, to prove that, prior to the killing, deceased was convicted of selling liquor in violation of the prohibition laws, and that defendant confessed judgment for a fine and costs in that case as surety for deceased, and to prove a contract between the two by which the deceased agreed to work for the defendant at \$4 per month until the fine and costs were paid.

The state was also allowed to prove by the wife of the deceased that she heard defendant tell deceased that the former would furnish the money to buy whisky and deceased could sell it, and they would divide the profit. This evidence was clearly admissible, in connection with other evidence, to show motive to commit the crime charged. Standing alone, it might not have such tendency; but in connection with other evidence which was unquestionably admissible, it does tend to show motive and corroborates other evidence of the state.

There was evidence tending to show that defendant was apprehensive that deceased might be a witness against him for some criminal offense, and that defendant was desirous of getting him out of the way, so that he could not or would not appear as a witness against the defendant. This evidence tended to show that defendant was guilty of a crime, and that the deceased could testify against him, and therefore that there was a motive for the killing as charged. There was evidence that the defendant had said before the killing that he would have to get Slaton out of the way before court sat, to keep him (Slaton) from appearing against him (defendant) in court; that if he could not get him out on good terms, he would on bad. It was also testified by one witness that defendant told the witness, a short while before the killing, that if he met Slaton that day he would put him out of the way, and that he told wit-

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ness that he (witness) would have to help to drag Slaton off the bushes. All this evidence offered by the state, as to which the defendant objected and excepted, was properly admitted. It is unnecessary to treat each phase of testimony separately. All the objections and exceptions as to the evidence were without merit, for the reasons assigned in this opinion, and those on the former appeal.

There was no error as to the giving or refusing of special instructions to the jury.

The case has been well briefed by able counsel, and there is no intimation that there was error as to the charges. While, of course, neither assignment of errors nor insistence in brief is necessary in criminal cases, we mention this to show that we have carefully examined the record, as required by the statute.

The question most urgently insisted upon by counsel for appellant as error to reverse is as to the special venire from which the jury was selected to try the cause. The order of the court as to the special venire, which is material to the question for discussion, is as follows: "It is further ordered that the number of jurors for the trial of defendant be fixed at 88, and that the sheriff summon 50 special jurors which the court then drew in open court, the defendant being personally present and by attorney which special jurors, together with the 38 jurors drawn and summoned on regular juries for the week during which defendant's trial is set, making a total of 88 persons, will form the venire from which to select a jury to try the defendant."

The defendant, by a timely motion, moved the court to quash the special venire, and objected to being put upon trial on the ground that: "Prior to the order of the court, directing that the jurors summoned for this week of the term and special jurors drawn shall consti-

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tute the venire from which to select a jury to try this defendant, the court had excused 10 of the jurors summoned for this week of the term, thus, in effect, reducing the number of jurors constituting the venire in this case from 88 jurors to 78 jurors, and upon the further ground that the list of jurors served upon this defendant from which to try him this day consisted of 88 names made up of 38 jurors summoned for this week of the term and 50 jurors drawn in open court, as a special venire for this cause, which, under the order of court made on a former day of this term, should constitute a special venire from which to select a jury to try this defendant, but, prior to the order of the court declaring what number should constitute the venire to try this cause, the court had excused 10 of the jurors, thereby depriving this defendant of a venire consisting of 88 names to which he was entitled under the order of the court, and furnishing him in fact a venire of only 78 names."

The facts stated in this motion were in open court admitted by the state to be true. The court overruled the motion, and required the trial to proceed; and the jury for the trial was selected without the ten jurors who had been formally excused being present, or being summoned after the case was set for trial and this special venire ordered. The defendant was thus required to select a jury of 12 for the trial of his case, from a venire of 78 instead of 88, as the previous order of the court fixed and directed. He was thus, by the action of the court, deprived of the presence of 10 persons of a number fixed by the statute and named as a class to constitute the venire for the trial of his case. This was clearly error, and if the question was properly raised, and not waived by the defendant, it must work a reversal of the judgment.—*Jackson's Case*, 171 Ala. 38, 55 South. 118.

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It is very probable that the defendant will never have present the full number of persons fixed by the order of the court from which to select the 12 to try his case; some may not be competent; some may be sick, or be engaged in the trial of another case, or be absent upon other unavoidable contingencies. The absence of jurors for such causes is no fault of the trial court, and never affords cause for quashing the venire, or delaying the trial to obtain the full number. Both the statutes and the decisions of this court so declare. But if the accused is deprived of the full number by some unauthorized act of the trial court, and the attention of the court is called to the error within time to correct it, it is the duty of the court to correct it; and a failure so to do must work a reversal where the error is to the prejudice of the accused.

It will not do to say that the court, by the initial order, could have fixed the number at 50, and that defendant, having the 78, would then have had more than the minimum number fixed by the statute, and therefore that he has no cause to complain. When the court, by the order, fixed the number at 88, this fact became a part of the record of the court, and gave the accused the same right to have that number, no more and no less, as if the statute had named 88 as the fixed number. Suppose the statute had thus fixed the number at 88, it would not do to say that, because the Legislature could have fixed a less number, the accused had no right to complain if he was given a less number than that fixed by the statute.

As before stated, the mere fact that all the persons enumerated in the order, or the full number, do not appear, from which to select the jury of 12 does not necessarily give the accused the right to quash the venire, or to postpone the trial until such persons can be brought in or substituted. The statute itself contem-

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plates such contingencies as those specified, and provides that they are not grounds to quash or to postpone the trial; but, where the persons enumerated in the order are absent by the unauthorized or erroneous act of the trial court, the rule is different, and it is then the duty of the court to correct the error upon timely application, and a failure or refusal to attempt to correct such error, under such conditions, will work a reversal.

This distinction between unavoidable absences and those caused by the act of the trial court was pointed out by this court in the case of *Adams v. State*, 133 Ala. 166, 171, 172, 31 South. 851, and in *Evans' Case*, 80 Ala. 6. Here, as in *Adams' Case*, the defendant was deprived of the full number, 88, by the act of the court itself in excusing 10 of the regular venire before the case was set for trial, and before the defendant ever had a right to their presence, or to object to their being excused, and by the failure to order the sheriff to summon them to appear as jurors for the trial of this case, as the statute expressly directs. The statute in this respect is as follows: "The court must, on the first day of the term or as soon as practicable thereafter, make an order commanding the sheriff to summon not less than fifty nor more than one hundred persons *including those drawn and summoned on the regular juries for the week set for trial.*"

The order in this case did not follow the statute as where italicized above; that is, it did not order the sheriff to resummon those persons "drawn and summoned on the regular juries for the week." If the court had so ordered, there would be no error of the court of which the accused could complain, though the sheriff had not resummoned them, or, being so summoned, they had failed to appear, or, if appearing after being summoned, the court had for good cause excused them. The statutes

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and the decisions make allowances for such contingencies; but, as we have shown, neither was the case here. The court excused these 10 jurors before they were even liable to jury service on this special venire, and failed to order them ressumoned, after they were drawn as jurors for the trial of this case. A trial court can, for good cause, excuse a juror from jury service after he is drawn and made liable for the particular service from which he is excused; but that does not excuse him from all jury service in the future, for which he is not then liable.

The 10 jurors in question were no doubt properly excused from jury service on the regular venires for the week for which they had been selected; but this did not excuse them from service on special venires like the one in question, for which they had not then been selected, named, or made liable. The regular venires for the week, and the special ones for the trial of capital cases for the same week, are separate and distinct entities, notwithstanding the regular ones are by the statute made a part of the special ones. They are treated so by the statutes and by the decisions of this court. See *Howard v. State*, 159 Ala. 30, 49 South. 108, and *Waldrop v. State*, 185 Ala. 20, 64 South. 80. This is clearly pointed out by this court, speaking through SOMERVILLE, J., in *Waldrop's Case*. It is there said: Under the previous statute (section 7263, Code 1907) only the special veniremen were required to be summoned specially for the trial, and it may be that the new provision that the *entire* venire, including the regular jurors drawn and summoned for the week, shall be summoned specially for the trial was intended to remedy the situation resulting from the decision in *Howard v. State*, 159 Ala. 30, 49 South. 108, wherein it was ruled that regular jurors for the week in which a capital case is set for trial

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were not competent jurors for that trial if postponed to a later week, because they were not *specialty summoned*, and therefore did not fall within the exception to the prohibition found in section 7247 of the Code. But, however this may be, it is certain that the failure of the court to cause such regular jurors to be *specialty* summoned is a defect which may be waived by the defendant, and which is waived by his failure to object to them as a part of the special venire before the trial is begun.—*Thomas v. State*, 94 Ala. 74, 10 South. 432; *Howard v. State*, 108 Ala. 571, 18 South. 813; section 29 of Jury Law (Sess. Acts 1909, p. 317). And it would seem that, even upon seasonable objection by the defendant, the irregularity would not be prejudicial error, unless it resulted in depriving him of the benefit of the number and character of veniremen named in the order of the court. Section 29 of the present law is explicit in declaring that all provisions 'in relation to the selection, drawing, summoning or impaneling of jurors' are merely directory, and not mandatory, and that 'no objection shall be taken to any venire of jurors except for fraud in drawing or summoning the jurors.' "

It is certain that the defendant did not waive the error in this case, he made timely objection, which would have enabled the court to correct the error, and to order the 10 jurors summoned, as the court should have done in the initial order fixing the number at 88.

It is true that the motion of the defendant was to quash the venire, and we are not prepared to say that there was error in refusing to quash because the statute limits the grounds for which venire may be quashed, or objections taken thereto, except for fraud in drawing or summoning the jurors. There was really no objection here to any of the venire or to its members. The real objection and insistence was that the accused be allowed

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the venire ordered, and not a part of it only. There was no complaint as to the venire ordered, fixed, or drawn, or to any one person a part of it; but the insistence was that the defendant be given the venire which the order of the court, by aid of the statute, had given him. This much he was entitled to, and should have been awarded, if practicable.

It may be that it would have been useless for the court to have ordered these 10 persons summoned, but there is no presumption of law that they would not have appeared, or, appearing, that they would have been excused, as they were, from service on the regular jury. The presumption must be indulged that if they had been summoned, they would have appeared and served.

A case in some respects similar to this was presented on the appeal of *Ziniman v. State*, 186 Ala. 9, 65 South. 56, in which case the effect of certain provisions of the present jury statute (Acts 1909, pp. 305-320), touching what is mandatory and what is not, and when the venire may be quashed and when not, was discussed. In that case, however, the mistake was merely as to the name of one of the persons summoned as a juror; there was no mistake or error of the court in failing to order the sheriff to summon all of the persons designated in the order for the special venire, nor in failing to correct the order when the attention of the court was called to the error by motion of defendant. It is true there was a motion to quash in both cases, and the court properly declined to quash in both cases; but here the motion to quash pointed out the error of the court, and the court could then have corrected the error, but declined to so do. It is true that the motion did not in terms request the court to then direct the clerk to summon the 10 persons in question; but attention was called to the error of omitting to require that the regular venire be resum-

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moned as the statute directs; and the court could and should then have corrected the error.

The majority of the court, however, hold that there was no error to reverse, and the case must be affirmed, and the views of the majority are given in the opinion of GARDNER, J., below.

GARDNER, J.—The foregoing, as to the question of the venire upon which the writer of this opinion would reverse the cause, expresses his views only. The majority of the court are of the opinion that the trial court cannot be put in error for its rulings in this respect, as shown by the record, and their views may be expressed as follows: The bill of exceptions on page 3 of the record shows that the defendant in the court below made a motion to quash the venire in the cause, upon the grounds previously herein stated, and which motion was overruled. As these grounds of the said motion were not such as would authorize the sustaining of the motion to quash the venire under the language of the statute, then it follows necessarily that the motion was properly overruled. The question was not sought otherwise to be raised, until *after the selection* of the jury, when defendant (page 4 of the transcript) made a motion to quash the venire and objected to being put upon trial, etc. The objection to being put upon trial was joined with the second motion to quash the venire, and was not made until *after the selection of the jury*.

The majority of the court are therefore of the opinion that, whether there was error as to the question of said venire (a question not necessary to be decided), the trial court cannot be put in error for any ruling made thereon as here presented, and that therefore, there appearing no reversible error in the record, the judgment should be affirmed.

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Affirmed.

ANDERSON, C. J., and McCLELLAN, SAYRE, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. MAYFIELD, J., dissents.

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Robbery.

(Decided June 30, 1914. Rehearing denied July 25, 1915.
66 South. 34.)

1. *Appeal and Error; Record; Review.*—Where no questions were raised on the trial as to the power of the court to try the case at that time, or of the legal organization of the grand jury that returned the indictment, the failure of the transcript on appeal to show the organization of the grand jury finding the indictment and the organization of the court at the trial term, was immaterial under the Supreme Court rules.

2. *Same; Defective Record; Dismissal.*—Where, on appeal the record is defective for a failure to show the organization of the court at the trial term, and the organization of the grand jury returning the indictment, the result would be the dismissal of the appeal and not a reversal.

3. *Jury; Special Venue; Waiver.*—A defendant may waive a special venue in a capital case under the provisions of section 7264, Code 1907.

4. *Same; Empanelling; Waiver.*—The Acts of 1909, p. 305, do not effect or repeal the subject of waiver by a defendant in a capital case of a special venue as authorized by section 7264, Code 1907.

5. *Witnesses; Cross-Examination; Extent.*—Where the prosecutor testified that as he was driving in a wagon along a road the defendant and five other negroes, masked, and with weapons and threats, forced him to deliver up his money, the question on cross-examination: "Don't you know that in a case like that if none of them had masks on their faces, it is hard to identify anybody?" was properly excluded as being argumentative as to the identification testified to.

6. *Evidence; Admissibility.*—The fact that defendant had been arrested by C. and been turned loose prior to his arrest by the witness, the witness stating that defendant stated that he had been previously arrested by M. but turned loose, was immaterial and properly excluded.

7. *Trial; Objections to Evidence; Necessity.*—Where defendant made no objection to evidence of the res geste of the offense of rob-

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bery against another, he could not complain of its admission on appeal.

8. *Robbery; Evidence.*—Where a prosecutor testified that when within about three quarters of a mile of town he was robbed by defendant and five other negroes, it is competent for a witness to testify that he had seen defendant in town about two hours before the commission of the offense and that he was with a crowd at that time.

9. *Same.*—Where it was shown that the robbery was committed while it was raining, it was competent to show by a witness that he saw defendant about three hours after the robbery, and that his clothes were wet and his shoes muddy.

10. *Same.*—Where defendant had had ample time and opportunity since the crime and before his arrest to dispose of the gun and money, it was proper to exclude evidence that when defendant was arrested neither a gun nor money was on his person.

APPEAL from Greene Circuit Court.

Heard before Hon. BERNARD HARWOOD.

Eugene Washington was convicted of robbery, and he appeals. Affirmed.

The transcript shows that the case of the state of Alabama against Eugene Washington was tried at a regular term of the circuit court of Greene county, begun and held on September 22, 1913, it being the time and place fixed by law for holding such court. Following this are the affidavits and warrants, and the judgment on the preliminary trial, and the indictment found and returned into court March 27, 1913. Then follows the special waiver and the judgment of the court, and then the bill of exceptions.

WRIGHT & FITE, for appellant. Defendant was entitled on cross-examination to test the power of the witness to identify defendant under the circumstances. The court was in error in permitting defendant to waive a special venire in this case.—*Howard v. State*, 160 Ala. 6; *Bankhead v. State*, 124 Ala. 14. The provisions of section 7264, Code 1907, have been repealed by the provisions of Acts 1909, p. 305, and that now is the exclu-

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sive law as to juries and jurors in this state. The record does not affirmatively disclose the presence of defendant when the verdict was rendered.—*State v. Hughes*, 2 Ala. 102; *Eliza v. State*, 39 Ala. 693; *Waller v. State*, 40 Ala. 325.

R. C. BRICKELL, Attorney General and T. H. SEAY, Assistant Attorney General, for the State.

SAYRE, J.—The rules adopted by this court June 23, 1913, dispose of defendant's objections that the transcript fails to show the organization of the court at the trial term and the organization of the grand jury by which the indictment was found, no question as to the power of the court to try this case at the term or time having been raised, nor any as to the lawful organization of the grand jury.—Supreme Court rules, 175 Ala. xviii, 57 South. vi, 61 South. vii. And if the record were defective in this respect the result would be that defendant's appeal would be dismissed.

Defendant filed a paper writing, whereby he waived "the summoning and impaneling of a special jury" to try his case, and also the service of a copy of the indictment upon him. We will not be expected to devote much argument to a demonstration of the proposition that the waiver of a special venire was a waiver of the right of a venire and of the service of a copy of a venire which was not called into existence by an order of the court, for the reason that the thing itself had been duly waived as the statute provided it might be.

There is no reason, constitutional or other, why a defendant in a capital case may not waive a special venire. Section 7264 of the Code of 1907 so provides. The act of August 31, 1909, entitled "An act 'to prescribe the qualifications of jurors and regulate the selection, drawing and summoning of jurors, and prescribe the qualifi-

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cations and provide for the appointment of jury commissioners and clerks of such commissions and regulate the impaneling of grand and petit juries, in all the courts of this state' " (Acts, Sp. Sess., 305, et seq.) and providing that "all laws, general, special or local, regulating the selection, drawing, summoning or impaneling of grand or petit juries, or prescribing the qualifications of jurors, or defining who are exempt from jury service, or exempting certain persons or classes of persons from service upon juries, are hereby expressly repealed, it being the intent of the Legislature, that, this act shall be the exclusive law on such subjects, in all the courts of the state of Alabama" (section 32), did not affect the subject of the waiver authorized by section 7264 of the Code, as it did not touch a number of other sections which relate to the conduct of jury trials. This was held in *McSweeney v. State*, 175 Ala. 21, 57 South. 732.

The prosecuting witness, Woodie Murphy, testified that as he was driving a wagon along the road about three-quarters of a mile from Eutaw, defendant and five other negroes, masked and with weapons and threats, required him to deliver up money he had on his person.

Defendant reserved exception to the action of the court in sustaining an objection to the following question: "Don't you know that in a case like that if none of them have masks on their faces it is hard to identify anybody?" This was nothing more than an argument that because of excitement, which the witness admitted, or for other reason, the witness' identification of defendant was of little evidential value, and should have been addressed in argument to the jury. It was entirely proper that the witness be not required to admit or deny the force of the argument against the weight of his testimony.

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The witness, Elam Smith, testified that he had seen defendant in Eutaw about two hours before the commission of the offense charged. There was no error in allowing this witness to state further that defendant was at the time with a crowd of boys. This last circumstance, if not of much evidential value one way or the other, was not, so far as we are able to see, prejudicial to any right of the defense.

Nor was it error to allow this same witness to testify that when he saw defendant during the night, about three hours after the robbery charged, his clothes were wet, his trousers were rolled up, and his feet were muddy. This is what might have been expected of a party to the crime, for at the time of its commission it had been raining.—*Campbell v. State*, 23 Ala. 44. It may have detracted somewhat from the probative force of this condition of defendant's person and clothing that a person exposed to the weather at any other place might have been in the same condition, but that was a question for the jury, and did not affect the admissibility of the evidence.

Nor was there error in sustaining the state's objection to defendant's question to the witness Rogers, asked with a view to showing that when the witness arrested defendant during the night he had on his person neither gun nor money, for there had been ample opportunity since the crime to dispose of these things.

Nor was there error in the exclusion of the proposed testimony of Dr. Cameron to the effect that he had arrested defendant, before his arrest by Rogers, and had turned him loose. That indicated nothing as to defendant's guilt or innocence, but only, perhaps, that Dr. Cameron had no information that would justify his detention. Nor was the admissibility of the circumstance which defendant here proposed to prove in any wise af-

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fected by the fact that the state had previously proved that defendant had stated to Rogers, when he arrested the defendant, that Mr. Meredith also had arrested him, but had turned him loose, for that, too, was of no consequence.

Nor was there error in any other ruling on the evidence. We need not notice other rulings in detail, and, for that matter, might, without impropriety, have pretermitted any discussion whatever of those to which we have specifically referred. We regard all of them as raising very simple propositions of law, and it seems quite obvious that none of them had any appreciable bearing upon the merits of the case. We have been content, therefore, merely to state our conclusion and the reasons therefor in a general way.

It may be proper to add, in view of some suggestions found in brief of counsel for the prisoner, that most likely all evidence touching the occasion when the witness Elam Smith had been robbed might have been excluded on timely objection, taking the ground that the state, by introducing evidence of the offense against Woodie Murphy, had elected to prosecute under that count of the indictment charging that offense, and should not have been allowed for that and possibly other reasons to show the offense against the person and property of Smith which was committed at a different time. But defendant made no objection of any character to the evidence of the *res gestæ* of the offense against Smith, and he cannot put the trial court in error by objecting to this evidence now on appeal for the first time.

We find no error, and the judgment of conviction must be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

[Ex Parte Ratley in re. Ratley v. The State.]

Ex Parte Ratley, in re Ratley v. The State.

Assault with Intent to Murder.

(Decided July 25, 1914. 66 South. 147.)

Criminal Law; Former Jeopardy; Conviction in Recorder's Court.—Under sections 1221-2, Code 1907, a conviction in a recorder's court on a complaint charging assault and battery, was a bar to a subsequent prosecution charging an assault with intent to murder, but based on the same facts, at the same time; the judgment in the first prosecution being a judicial determination that the crime was not a felony.

CERTIORARI to Court of Appeals.

Raymond Ratley was convicted of an assault with intent to murder, and on appeal to the Court of Appeals, judgment of the trial court was affirmed. He brings certiorari to review and revise such judgment. Writ granted.

See *Ratley v. State*, 11 Ala. App. 104, 65 South. 683.

J. E. Z. RILEY, for appellant. Counsel insists that the plea of former jeopardy was improperly overruled, and in support thereof cites the authorities to be found in his brief in 11 Ala. App. 104.

R. C. BRICKELL, Attorney General and T. H. SEAY, Assistant Attorney General, for the State. Counsel use same authorities as set out in their brief in the former appeal, 11 Ala. App. 104.

DE GRAFFENRIED, J.—Sections 1221 and 1222 of the Code of 1907 are, in substance, the same provisions which at one time formed a part of the charter of the city of Montgomery, and which were construed by this court in *Jackson v. State*, 136 Ala. 96, 33 South. 888.

[Ex Parte Ratley in re. Ratley v. The State.]

While the city of Ozark has an ordinance which provides a punishment for assaults and batteries, the affidavit in this case charged the defendant, Ratley, with an offense which is a crime under the laws of the state. It matters not, therefore, in so far as this case is concerned, whether the recorder, in this prosecution, proceeded against the defendant under the ordinance of the city of Ozark or under the state law. The affidavit which gave him jurisdiction charged a crime under the state law, and it can hardly be insisted that the recorder, after he had convicted the defendant of the offense charged in the affidavit, and collected the fine imposed upon him under the judgment of conviction, could then have turned round and had the defendant arrested under another affidavit charging the same offense in the same words, and then again have convicted him and collected another fine out of him under the pretext that one prosecution was had under the state law and the other under the city ordinance. The truth is that, under the above section 1221 of the Code of 1907, a recorder is, in so far as misdemeanors which are committed within his city or town, or within the police jurisdiction of his city or town, are concerned, a judicial officer of the state, and possesses the same jurisdiction over such misdemeanors as a county court or court of like jurisdiction. The above section expressly so provides, and this provision was adopted for the purpose of providing against a double punishment for the same unlawful act. —*Jackson v. State*, *supra*; *Culpepper v. Adams*, 1 Ala. App. 536, 55 South. 325; *Adams v. City of Troy*, 1 Ala. App. 544, 56 South. 82. This judicial officer of the state, by assuming final jurisdiction in this matter, judicially determined that the crime which the defendant had committed was not a felony. The judgment of conviction so declares, but the fact that *final* jurisdiction was as-

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sumed was itself tantamount to a judicial determination that the recorder had the jurisdiction to act.

If the defendant's plea of former conviction is true, then he is entitled to his discharge from this prosecution.—*Jackson v. State, supra*; *Moore v. State*, 71 Ala. 307. To give further reasons for this holding is useless, as the reasons fully appear in *Jackson v. State, supra*, and *Moore v. State, supra*.

2. In the case of *Harris v. State*, 2 Ala. App. 117, 56 South. 55, the effect of that clause of the Constitution which provides that "no person shall for the same offense be twice put in jeopardy of life and limb," upon section 1221 of the Code, does not appear to have been presented to or considered by the court. For that reason that case cannot be regarded as of any value on the subject above discussed.

The rulings of the appellate court were not in harmony with the above views, and for that reason the judgment of the Court of Appeals is reversed, and the cause is remanded to that court for further proceedings.

Reversed and remanded. All the Justices concur.

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Assumpsit.

(Decided May 12, 1914. Rehearing denied June 18, 1914.
65 South. 1003.)

1. *Conspiracy; Civil Action; Damages.*—The gist of an action for conspiracy is the damage and not the conspiracy, and the damage must have been the natural and proximate consequences of the acts of the conspirators; until something has been done or accomplished in the pursuance of the conspiracy it is the mere unfulfilled intention of several persons to commit a wrong, and not actionable.

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2. *Pleadings; Complaint; Allegation; Conclusion.*—Where the facts set out in a complaint contradict the general conclusion, in determining the sufficiency of the complaint the conclusion must yield to the facts alleged.

3. *Carriers; False Bill of Lading; Complaint.*—Where the action was by the buyer of a bill of lading against the carrier purporting to have issued it, for the damages proximately resulting from a conspiracy between the alleged shipper and the carrier's agent, a complaint alleging that such bill of lading was spurious, that the agent of the carrier in entering into the conspiracy was acting within the scope of his employment, but which does not allege that the things conspired to be done were within the scope of his employment, does not state a cause of action against the carrier either at common law, or under the provisions of section 6136, Code 1907.

4. *Same; Liability to Purchaser.*—Where the purchaser of a spurious bill of lading sues the carrier purporting to have issued it, and in his complaint simply sets up a conspiracy between the alleged shipper and agent of the carrier to do certain things, the issuance of the bill of lading by the shipper and the purchaser thereof by plaintiff as an innocent purchaser, the complaint cannot be sustained on the theory of a system of business in which the issuance and sale of a spurious bill of lading constituted one item, and the issuance of a genuine bill on the delivery of the goods on the forged bill another item, and the delivery or the procuring of the delivery of the goods on the forged bill, another item, and all necessary to carry out the system causing the loss.

5. *Same; Authority of Agents; Issuance of Bill of Lading.*—An agent of a carrier has no authority to issue a bill of lading for goods before they are received for shipment, and the carrier is not responsible for the unauthorized acts of an agent in issuing a bill of lading before receiving the goods.

6. *Same.*—The provisions of section 6136, Code 1907, do not make a carrier liable for the act of an agent in issuing a bill of lading before receiving the goods, where the agent was not authorized to issue bills of lading at all, and to make a carrier liable it must appear that a bill of lading was issued or authorized by an agent charged with the duty of issuing such document.

APPEAL from Morgan Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Action by the National Park Bank of New York against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The following is amended count 5: Plaintiff claims of defendant the other and further sum of \$150,000 damages suffered by it as a proximate result of a wrongful conspiracy entered into, to wit, the year 1905, by and

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between Knight, Yancey & Co., a partnership, doing business at Decatur, Ala., and the defendant Louisville & Nashville Railroad Company, which conspiracy was as follows: Knight, Yancey & Co. were engaged in the business, among other things, of buying cotton, and of shipping it to various importers in Europe. Such export business is ordinarily and legitimately carried on, so far as making the payments for cotton is concerned, by the seller drawing drafts on the purchaser for the price of the cotton, and to these drafts attaching bills of lading issued by carriers to the shipper's order for cotton, which drafts with such bills of lading so attached are discounted by the shippers to banks. Such practices prevailed at all the times referred to herein. Defendant was and is a common carrier, and was and is engaged by itself, and in connection with other carriers, in the transportation of cotton from points on its line and railroad to various European ports. Knight, Yancey & Co., and defendant through its agent John A. Bywater, or other agents of it, whose names are to plaintiff unknown, all of whom were therein acting within the line and scope of their employment, in, to wit, the year 1905, wrongfully conspired that thereafter said Knight, Yancey & Co. would make up and utter false and spurious documents purporting to be defendant's bill of lading for cotton shipped by them over defendant's railroad, and the same use and dispose of it in the conduct of their cotton exporting business as if they were defendant's genuine bills of lading issued for cotton received by it; and defendant would through the influence of its business relations with its connecting carriers aid and assist in causing delivery to be made by such false and spurious bills of lading of any cotton, which said Knight, Yancey & Co. might subsequently to the issue of such false and spurious bills of lading ship

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over defendant's railroad and connections, marked and consigned in substantial conformity with the purported marks and consignment of the cotton purported to be shipped under such false and spurious documents, and pursuant to and as a part of such conspiracy the said Knight, Yancey & Co., between, to wit, April 7, 1910, and April 30, 1910, made up and issued false and spurious documents purporting to be defendant's bill of lading calling for the carriage by defendant and connecting carriers of, to wit, 1,950 bales of cotton from points in Alabama to Liverpool, England, shipped by Knight, Yancey & Co. to their own order; and plaintiff says that said Knight, Yancey & Co. attached said false document to negotiable drafts drawn by them on drawees in Liverpool, England, for the face amount of \$150,000, and the same discounted or caused to be discounted with plaintiff which was and is a bank doing business in New York City, to wit, the sum of \$150,000. And plaintiff says that it discounted said drafts in the usual course of business, and in good faith believing that the documents thereto attached were defendant's genuine bills of lading, and plaintiff says that drafts and said bills of lading were wholly worthless, and that the said sum paid by it for said draft with said bills of lading attached has been wholly lost by it, and that said draft and bills of lading attached are its property.

GREGORY L. SMITH, and EYSTER & EYSTER, for appellant. A master is not liable for any act of the agent done outside the line and scope of his authority or employment.—*Steele v. May, et al.*, 135 Ala. 488; *Hardeman v. Williams*, 150 Ala. 418. No cause of action arises out of the act of conspiring, but only out of acts done pursuant to a conspiracy.—*Schwab v. Mabley*, 47 Mich. 572; *Hutchins v. Hutchins*, 7 Hill 104; *Commercial*

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Union Ass. Co. v. Shoemaker, 88 N. W. 156; *City of Boston v. Simmons*, 23 N. E. 210; *M'Henry v. Sneer*, 10 N. W. 234; *Taylor v. Bidwell*, 4 Pacific 491; *Herron v. Hughes*, 25 Cal. 561; *Hilliard on Torts*, vol. I, page 37; *Cooley on Torts*, page 142; 8 Cyc. 645; *Hundley v. Louisville, etc., R. R. Co.*, 48 S. W. 429; *Brinkley v. Platt*, 40 Md. 529; *Bowen v. Matheson*, 14 Allen 499; *Hauser v. Tate*, 85 N. C. 81. The civil effect of a conspiracy is to extend the right of action for the tort committed under it, beyond the person actually committing it, to all persons to the conspiracy.—*Randall v. Hazelton*, 12 Allen 414; *Van Horn v. Van Horn*, 20 Atl. 485; *Robinson v. Parks*, 24 Atl. 413; *Lee v. Taylor*, 11 N. Y. Sup. 132; 8 Cyc. 647; *Cooley on Torts*, page 144; *West Va. Trans. Co. v. Standard Oil Co.*, 40 S. E. 592; *Kimball v. Harmon*, 34 Md. 401; *Garing v. Fraser*, 76 Me. 37; *Brinkley v. Platt*, 40 Md. 529; *Hornblower v. Crandall*, 78 Mo. 581; *Breedlove v. Bundy*, 96 Ind. 319; *Hunt v. Simmonds*, 19 Mo. 583; *Western U. Tel. Co. v. Sledge*, 153 Ala. 291; *Western U. Tel. Co. v. Howle*, 156 Ala. 332. The master is not liable for an act done by a third person pursuant to a conspiracy with a servant, where the only act done was not within the scope or line of the servant's employment.—*West Va. Trans. Co. v. Standard Oil Co.*, 40 S. E. 593; *Zinc Carbonate Co. v. First National Bank*, 79 N. W. 231. The master is not liable for the acts of a third person acting in the place of the servant, unless the act done is one within the line of the servant's employment, and is done in the prosecution of the master's business.—*Hill v. Sheehan*, 20 N. Y. Sup. 529. It is not sufficient that the act was done while prosecuting the master's business, but must have been done in furtherance thereof and as incidental to the duties entrusted to him.—*Steele v. May, Buttrey & Cooney*, 135 Ala. 488; *Hardeman v. Williams*, 150 Ala.

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418. If, in entering into the conspiracy, the agent did no act within the line or scope of his employment, then he bound himself individually, but he did not bind the defendant.—*King v. Livingston Mfg. Co.*, 60 South. 144. An agent of a railroad company cannot, as a matter of law, be acting within the line or scope of his employment in conspiring that another shall forge bills of lading for which no property has been delivered to the carrier for transportation.—*Jemison v. B. & A. R. R. Co.*, 125 Ala. 378; Hutchinson on Carriers, sections 160 and 161; *Friedlander v. Texas & Pac. R. R. Co.*, 130 U. S. 416; *Robinson v. M. & C. R. R. Co.*, 9 Fed. 139; *Jasper Trust Co. v. K. C. M. & B. R. R. Co.*, 99 Ala. 420; *Ala. Grt. Sou. R. R. Co. v. Commonwealth, etc.*, 146 Ala. 388. The delivery in Europe of cotton shipped over defendant's line and connecting carriers was no part of the defendant's business, unless there was some special contract or relation or partnership or agency between the carriers.—*Southern Express Co. v. Saks*, 160 Ala. 624. When a complaint alleges a conclusion, followed by a statement of facts upon which the conclusion is based, the facts alleged must support the conclusion, or the complaint will be subject to demurrer.—*B'ham Ry., L. & P. Co. v. Weathers*, 164 Ala. 23; *B'ham Ry., L. & P. Co. v. Jordan*, 170 Ala. 534; *Merrill v. Sheffield*, 169 Ala. 251; *Selma Street & Suburban Ry. Co. v. Campbell*, 158 Ala. 445. A complaint that does not state a cause of action will not support a judgment.—*L. & N. R. R. Co. v. Williams*, 113 Ala. 402; *Trott v. B'ham R. L. & P. Co.*, 144 Ala. 383. When the complaint does not state a cause of action, the defendant is entitled to a verdict, regardless of what the evidence may be.—*Scarborough v. Rowan*, 125 Ala. 511. Where plaintiff does not make out a case, defendant is entitled to have all of the evidence excluded from the jury.—*Talladega Ins. Co. v.*

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Peacock, 67 Ala. 262; *Pritchard v. Sweeney*, 109 Ala. 651; *Gulf City Con. Co. v. L. & N. R. R. Co.*, 121 Ala. 625; *Brennfleck v. M. & O. R. R. Co.*, in Mss. No liability was shown under the statutory law of Alabama.—Code of 1907, section 6136; *Ala. Grt. Sou. R. R. Co. v. Commonwealth, etc.*, 146 Ala. 388. The delivery in Europe to holders of forged bills of lading, of cotton shipped to meet them was a lawful and proper act.—*The Idaho*, 93 U. S. 578; *Lovell v. Newman*, 188 Fed. 534; *Lovell v. Newman*, 192 Fed. 753. A charge that gives undue prominence to any particular facts is erroneous.—*Jones v. State*, 174 Ala. 85. One who has authority to do an act in a lawful manner has no implied authority to do it in an unlawful manner.—*Russell v. State*, 71 Ala. 350. An agent who is without authority to do an act cannot ratify that act when done by another.—31 Cyc. 1248, 1250; *Cook v. Tullis*, 18 Wallace 332; *Gambill v. Fuqua*, 148 Ala. 456; *Morton v. Bradley*, 30 Ala. 683; *Chapman v. Lee*, 47 Ala. 143. When one forges a bill of lading and then ships cotton intended to be delivered thereunder, the holder of the forged bill of lading is entitled to receive such cotton.—*The Idaho*, 93 U. S. 578; *Lovell v. Newman*, 188 Fed. 534; *Lovell v. Newman*, 192 Fed. 753; *Cent. of Ga. R. R. Co. v. Chicago Varnish Co.*, 169 Ala. 290.

PERCY, BENNERS & BURR, CALLAHAN & HARRIS, HARRINGTON, BINGHAM & ENGLAR and LOUIS F. DOYLE, for appellee. As to the law of conspiracy, see 3 Enc. of Evid. 408; *Tanner v. State*, 92 Ala. 1; *Ferguson v. State*, 134 Ala. 63; 3 Greenl. Evid. 93; *Martin v. State*, 89 Ala. 115; *Phoenix I. Co. v. Moog*, 78 Ala. 284; *Mason v. State*, 42 Ala. 532; *Scott v. State*, 30 Ala. 503; *Crittenden v. State*, 134 Ala. 145. The following cases show a common state of fact along broad lines, and the applications

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of the same principles of law will necessarily follow.—*Rogers v. V. S. & P. R. R. Co.*, 114 C. C. A. 85; Same Case, 225 U. S. 713; 56 Fed. 369; 195 Mo. 195; 77 C. C. A. 499; 66 C. C. A. 375; *W. U. T. Co. v. F. & M. Bank*, 62 South. 250; 44 Pac. 192; 113 C. C. A. 124; 48 L. R. A. 211; 198 Fed. 898. When in the course of his employment, an agent acquires knowledge or receives notice of any fact material to the business in which he is employed, the principal is deemed to have notice of such fact except where the agent acquires the knowledge while acting for himself in his own interest and adverse to the interest of his principal.—8 L. R. A. (N. S.) 883; 216 U. S. 504; 31 Cyc. 1587, 1594; 204 U. S. 272; 2 Thomp. on Corp. § 1655; Clark & Skyles on Agency, § 485; 199 U. S. 160. The conspiracy of Bywater was not to defraud his principal, but was directed against third persons.—2 Thomp. on Corp. § 1667 and cases cited; *First Nat. Bank v. Allen*, 100 Ala. 476; *Hall, et al v. Holley F. & M. Co.*, 56 South. 726; *Frenkel v. Hudson*, 82 Ala. 158. It was Bywater's duty to report to his superior.—31 C. C. A. 499; 2 Thomp. § 1647, and authorities supra.

ANDERSON, C. J.—Amended count 5 of the complaint, being the only one submitted to the jury, and which will be set out by the reporter, seeks to charge the defendant with liability for injury resulting to the plaintiff from the purchase by it of a certain bill of lading for 1,950 bales of cotton, purporting to have been issued by said defendant railroad company, but which was false and spurious, having been made up and uttered by Knight, Yancey & Co., resulting from a conspiracy entered into between said Knight, Yancey & Co. and defendant's agent Bywater, or other of defendant's agents whose names are unknown.

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There are other averments, as to what the defendant's agents were to do, in pursuance and execution of the conspiracy, but the performance of which is not averred; and, if that feature as to the delivery of the cotton upon said spurious bill of lading had been complied with, we doubt the bringing of this suit.

The result is that the gravamen of the action, when sifted down to its final analysis, is that the plaintiff purchased a bill of lading purporting to have been issued by the defendant for cotton which was never delivered to the defendant, and that the said bill of lading was therefore worthless; that said bill of lading was issued by Knight, Yancey & Co. to themselves, in the name of the defendant and in pursuance of a conspiracy entered into between said Knight, Yancey & Co. and its agent John A. Bywater, or other agents of the defendant, all of whom were therein acting within the line and scope of their authority.

The complaint avers, in general terms, that the said Bywater and other agents were "therein"—that is, in entering into the conspiracy—acting within the line and scope of their employment, but does not charge that the things they conspired to do were within the scope of their employment. A charge that an agent entered into a conspiracy to do a wrong when acting within the scope of his employment falls far short of charging that the acts which he conspired to do were within the scope of his employment. In other words, this count 5, which must be construed more strongly against the pleader upon demurrer, simply charges that when Bywater, or the other agents, were acting within the scope of their employment, they entered into a conspiracy to do certain things; but it does not charge that the things done, or to be done, were within the scope of the employment of said agents.

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"The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. The damage is the gist of the action, not the conspiracy; and, though the conspiracy may be said to be of itself a thing amiss, it must nevertheless, until something has been accomplished in pursuance of it, be looked upon as a mere unfulfilled intention of several to do mischief."—Cooley on Torts, § 143.

"Unless something is actually done by one or more of the conspirators pursuant to the scheme and in furtherance of the object which results in damage no civil action lies against any one. The gist of the action is the damage and not the conspiracy, and the damage must appear to have been the natural and proximate consequence of defendant's acts."—8 Cyc. p. 645, and cases cited.

The result is the proximate cause of plaintiff's damages, as disclosed by count 5, was the issuance of a false and spurious bill of lading by Knight, Yancey & Co., in the name of this defendant, and in pursuance of a conspiracy with Bywater, or other agents of the defendant who, as charged, were acting within the scope of their employment when entering into the said conspiracy. It is not charged that the thing conspired to be done or which was done, in pursuance of the conspiracy, was within the scope of the employment of said agents.

We therefore hold that if the averment of the conclusion would suffice, and if it stood alone, it does not charge that the act done was within the scope of the employment of the defendant's agents; but if such was the case, and the pleader, after stating the conclusion, goes further and sets out the facts and said facts show that there was no power in the agents the conclusion must yield to the facts set out.—*Birmingham R. R. v.*

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Jordan, 170 Ala. 534, 54 South. 280; *Merrill v. Sheffield*, 169 Ala. 251, 53 South. 219; *Selma St. R. R. v. Campbell*, 158 Ala. 445, 48 South. 378. Therefore, if it be admitted, but which is not the fact, that the general averment that the things therein referred to as being within the scope of the agent's employment related to the things to be done in furtherance of the conspiracy, then the facts as specifically set up would negative such an averment, under the common law, as it is well settled by the decisions of this and most of the courts of the country that an agent of a public carrier has no authority to issue a bill of lading for goods before the same are delivered for shipment and that the carrier is not responsible for such unauthorized acts of its agent.—*Hutchinson on Carriers*, 161; *Friedlander v. T. & P. R. R.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Jemison v. Birmingham & A. R. Co.*, 125 Ala. 378, 28 South. 51; *Jasper Co. v. K. C. M. & B. R. R. Co.*, 99 Ala. 416, 14 South. 546, 42 Am. St. Rep. 75. The wrongful act alleged to have been done under the conspiracy, and to which the servant is alleged to have agreed, was the issuance by Knight, Yancey & Co. of documents purporting to be bills of lading of the Louisville & Nashville Railroad Company, without the company having received any property for transportation thereunder. If the agents of the defendant would not have been acting within the line or scope of their employment had they themselves issued such a document, they would not, of course, have been acting within the line or scope of such employment in attempting to authorize, or in aiding others to do so. Clearly, under the common law, the agents of the defendant could not issue spurious bills of lading so as to bind the principal.

It is true that section 6136 of the Code of 1907 was enacted to remove, to a great extent, the seeming hard-

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ship of the common law, by protecting innocent people who deal with bills of lading issued by agents of carriers, whether genuine or not, upon the theory that the carrier and not the innocent person should suffer for the loss on a false bill of lading, when issued by one in its employment with authority to issue such documents. —*Jasper Co. v. K. C. M. & B. R. R.*, 99 Ala. 416, 14 South. 546, 42 Am. St. Rep. 75. The effect of this change, however, was not to make the carrier liable for bills of lading issued by one, though an agent, who had no authority to issue bills of lading. In other words, the prime, if not the sole, purpose of the enactment, was to make the act within the scope of the employment of an agent who was authorized to issue bills of lading, and to counteract the rule of the common law, that the issuance of a spurious bill of lading was not within the scope of the employment of an agent employed only to issue genuine ones.

It would therefore appear that under the law as changed by our statute, in order to fasten liability upon the carrier for the issuance of a false bill of lading, it must have been issued, or authorized, by an agent charged with the duty of issuing such documents; and that the law does not apply to agents who are not so charged or whose line of employment and duties in no wise pertains to the issuance of such documents. The complaint not having charged that the agents of the defendant were acting in the line or scope of their authority in assenting to the issuance of the bill of lading, or that the issuance of bills of lading, or the authorization of the issuance of same, was within the scope of employment of the agents who conspired with said Knight, Yancey & Co., failed to charge liability against the defendant under the statute as well as under the common law; and the trial court erred in not sustaining the defendant's

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demurrer to amend count 5. Indeed, it is questionable if it states a cause of action.

We have dealt with this count of the complaint, upon the only theory upon which it could possibly be regarded as attempting a cause of action against this defendant, but have not been unmindful of the argument in appellee's briefs, as to the theory upon which it seeks a recovery. Indeed, counsel disclaim any reliance upon a right to recover under either the common law or the statute, for the issuance of a bill of lading by any agent of the company. They say: "In this case we deal, not with the issuance of a bill of lading in a simple transaction, but with the creation of a system of business in which the issuance and sale of the forged bill of lading was one item, the issuance of the genuine bill upon the delivery of the cotton on the forged bill was another item, the delivery or the procuring of the delivery of the cotton on the forged bill was another item, and all three were necessary cogs in the machinery which was used in carrying on this system of business, and which finally resulted in the loss, without fault on the part of this plaintiff and others, of large sums."

If this is the theory upon which plaintiff sought a recovery, whether sound and actionable or not, such a case is not presented by the only count of the complaint with which we can deal. Said count does not charge a series of acts, or a course of conduct, as being the cause of the plaintiff's injury or damage, and does not aver all three of the acts, which were "necessary cogs in the machinery." The complaint does not state or cover such a case as is stated or contended for in brief of counsel. As we view the complaint, it simply sets up a conspiracy to do certain things, and that a bill of lading was falsely issued by Knight, Yancey & Co., which plaintiff bought as an innocent purchaser. It does not charge that the

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defendant did a series of acts or a single act in furtherance of the system contemplated by the conspiracy, or that a system or general course of conduct was the proximate cause of the plaintiff's damage. The gravamen of the complaint is the false issuance of one bill of lading by Knight, Yancey & Co., in pursuance of a conspiracy with some agent or agents of the defendant, who were not charged with duties in connection with the issuance of such bills of lading.

We agree with counsel that the facts as argued present a rather unique case, and show a series of colossal frauds upon the commercial world; but the complaint is not grounded upon the theory argued and contended for in brief of appellee's counsel.

The judgment of the law and equity court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD, DE GRAFFENRIED, and GARDNER, JJ., concur.

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Assumpsit.

(Decided April 16, 1914. Rehearing denied June 24, 1914.
65 South. 1015.)

1. *Fraud; Representations; Duty to Investigate.*—A party to whom representations are made may rely upon them without instituting an independent investigation, where the statements are made as of facts, especially of matters which may be within the knowledge of the party making them.

2. *Same; Opinion.*—Where the parties deal at arm's length, the expressions of opinions by a seller as to the property, such as to current market values, etc., cannot be made the ground for an action of deceit, since the vendee had no right to rely thereon.

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3. *Same; Jury Question.*—Under the evidence in this case it was a question for the jury whether the representations of the vendor as to the value of the goods were mere expressions of opinion or statements of fact on which the vendee was entitled to rely.

4. *Same; Trader's Talk.*—A seller is not liable either in contract or tort for mere "trader's talk."

5. *Same; Representations; Opinion.*—Although the value of property is often a matter of opinion, yet if the purchaser states his ignorance and invites the opinion of the seller, and gives him to understand that he relies on that opinion, the vendor is not bound to answer, but if he does answer, he must speak the truth, since under such circumstances the affirmation of a definite opinion as to value becomes an affirmation of a fact—of the fact of a bona fide opinion.

6. *Same; Jury Question.*—Whether an opinion of a vendor concerning the value of property has been elicited under such circumstances of confidence as to induce the purchaser to forbear independent investigation, is usually a question for the jury.

7. *Same.*—If, after an independent investigation which proves unavailing or unsatisfactory, a purchaser goes to the vendor, demanding assurance, the question as to whether he relied on an assurance so obtained is for the jury.

8. *Same; Damages.*—In an action for deceit and assumpsit by a purchaser against a seller, the proper measure of damages is the difference between the actual value of the property at the time of sale or exchange, and its represented value.

9. *Appeal and Error; Harmless Error; Pleading.*—Where the general issue was pleaded in due form, any error in sustaining demurrer to a plea which was no more than the general issue, was harmless.

10. *Charge of Court; Conformity to Evidence.*—Charges seeking to limit the inquiry as to fraudulent representations to one certain occasion during the negotiations which led up to the sale were properly refused where there was evidence of similar representations made on the occasion when the sale was consummated.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Action by the Smith Sons Lumber Company, a corporation, against Richard Tillis. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the counts referred to:

(5) "Plaintiff claims of defendant the sum of \$100,000 as damages, for that, to wit, on the 29th day of July, 1908, one W. T. McGowin, one E. L. McGowin, and I. E. Boyette had been negotiating with plaintiff for the purchase of certain of its assets consisting of a large

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amount of real and personal property at and for the sum of \$200,000; that pending said negotiation it became necessary for the vendees to procure some one to finance the deal for them, and on, to wit, the last day aforesaid, the vendees offered to purchase the said assets at and for the sum of \$151,000, and also for certain bonds of the Norfolk & Southern Railway Company, called Norfolk & Southern Railway Company, first, and refunding 5 per cent. sinking fund gold bond of the face value of \$44,000, and also for 150 shares of what was called preferred stock of said railroad company of the par or face value of \$15,000, and also for 250 shares of what was called the common stock of said railroad company, a portion of which said \$151,000 and all of which said bonds and stock the defendant had agreed to furnish at the face value of said bonds and preferred stock as a loan to the vendee, knowing the aforesaid purpose for which they were to be used, and to take as security therefor from them a first mortgage on the chief assets so to be sold by plaintiff to vendee, and plaintiff avers that it knew nothing as to the value of said bonds and stock, and, before accepting said offer, its representative on its behalf informed defendant in substance that it knew nothing of the value of said stocks and bonds, and inquired of defendant as to the true value thereof; that said defendant then and there stated to the representative of plaintiff in substance that said bonds and said preferred stock were as good as gold, and worth dollar for dollar, and that said bonds were secured by a first mortgage on the property of said railroad company; that said common stock was of practically no value; that shortly thereafter plaintiff agreed to and did accept the said offer of said vendee, relying upon the representation of defendant as aforesaid, and conveyed to the said vendees the assets purposed to be purchased

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by them as aforesaid, and said stocks and bonds were thereupon delivered by defendant to plaintiff as in part payment of said consideration. Plaintiff avers that said bonds and stock at the time of said transaction were not good, and not worth dollar for dollar, but on the contrary were of little or no value, that said bonds were not secured by first mortgage, and that the said railroad company was then in the hands of a receiver. And plaintiff avers that said representation of defendant as to the value of said bonds and preferred stock, and as to the security for said bond, were falsely and fraudulently made by defendant for the purpose and with the intent to deceive and mislead plaintiff, which representations did in fact deceive and mislead plaintiff, to his damage as aforesaid."

(7) Same as 5 as to the transaction, except that it is alleged, in addition to the above consideration, that "the vendees named were to execute two promissory notes, one for \$16,000, payable one year after date, and one for \$25,000, payable two years after date, which latter sums were to be secured by mortgages on all or substantially all of the assets purchased, said mortgage to be subject to a first mortgage given to Tillis; that the proposition was made upon the condition that Tillis would furnish the stocks and bonds and a part of the cash; and that said Tillis did agree to furnish said stocks and bonds at the face or par value thereof and a part of the said cash sum, provided the vendees would execute him a first mortgage on all of the real and personal property which they proposed to purchase from plaintiff, the mortgage to be in the sum of \$150,000, which included the face or par value of said bonds and preferred stock, and provided, further, that plaintiff would pay Tillis the earned or accumulated interest, amounting to \$550. The negotiations were being conducted and carried on in the

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state of Alabama, and the said Norfolk & Southern Railway was a corporation operating a railroad in the state of Virginia, with its principal place of business in the city of Norfolk, and plaintiff was ignorant of the real and true value of said stocks and bonds, and before accepting the proposition, its representative informed the said Tillis that it was ignorant of the value of said stocks and bonds, and inquired of him as to the real value thereof, and that said defendant Tillis represented and stated to that representative of plaintiff in substance that said bonds and preferred stock were as good as gold, and were worth dollar for dollar; that said bonds were secured by a first mortgage on all of the property of said railroad company, but that the common stock was of no value. Plaintiff avers that, relying upon said representation, it thereupon accepted the said proposition of the vendees, and received from said Tillis the stocks and bonds, and paid him the earned or accumulated interest of \$550, and conveyed to the said vendees, its sawmill plant and other real and personal property as aforesaid; that the said vendees thereupon executed to the said Tillis a first mortgage on said property for the sum of \$150,000, which included the face or par value of said bonds and preferred stock, and a second mortgage to plaintiff as agreed. And plaintiff avers that the representations of said Tillis as to the value of said bonds and said preferred stock were untrue, and were known by him to be untrue, and that the railroad company was then in the hands of a receiver in a proceeding wherein the mortgage given to secure the said bonds was sought to be foreclosed, which fact was then known to defendant; that the said preferred stock was practically worthless; that said bonds had no market value, and were worth in truth and in fact only about 50 cents on the dollar; that the said mortgage was not a

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first mortgage on the property of said railroad company as represented by the said Tillis as aforesaid; and that the said representations of said Tillis were falsely and fraudulently made for the purpose of deceiving plaintiff and inducing it to accept said stocks and bonds as a part of the purchase price as aforesaid, and which did deceive plaintiff and induce the acceptance of said stocks and bonds, and the sale and conveyance by it of the property aforesaid."

The allegation of deceit is the same in the eighth as in the seventh count. The ninth is the same as the seventh and eighth, with the same allegation as in the seventh count as to the deceit.

Defendant moved to strike from the fifth count the following: "That said bonds and said preferred stock were as good as gold, and worth dollar for dollar"—and also: "The value of said bonds and said preferred stock."

Also moved to strike from the sixth count the following: "And plaintiff avers that the representation of the said Tillis as to the value of the said bonds and the said preferred stock were untrue, and known by him to be untrue."

Also moved to strike from the seventh count the following: "That the said bonds and preferred stock were as good as gold, and worth dollar for dollar."

The same motion was made as to the eighth and ninth counts.

The pleas were as follows: (4) The alleged false representation of this defendant was as to a fact not peculiarly within the knowledge of this defendant, but was one as to which plaintiff had equal and available means and opportunity for information as this defendant had.

(5) That the alleged false representation of this defendant [same as 4 down to and including the last word therein]; and defendant further avers that plaintiff fail-

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ed to exercise reasonable care and prudence to ascertain the alleged falsity of said representation; and defendant further avers that plaintiff negligently and carelessly failed to make use of its said means and knowledge, and, if it had done so, it would have discovered and found out the true and real value of said bonds and stock in said complaint mentioned.

Plea 3 substantially appears from the opinion.

The following charges were refused to defendant: (9) If any individual juror, after a fair consideration of all the evidence, is reasonably satisfied by any material part of the evidence that defendant did not state to the witness Keyser, at the office of Hill, Hill & Whiting, that the bonds and preferred stock were as good as gold, and worth dollar for dollar, and in substance that the mortgage securing the bonds was a first mortgage on the property, you cannot find for plaintiff for any damages as the result of any fraud or deceit or misrepresentation on the part of defendant.

(12) Plaintiff cannot recover in this case, unless the jury is reasonably satisfied from the evidence that defendant, in the office of Hill, Hill & Whiting, falsely represented to the witness Keyser the value of the bonds and preferred stock, and that the bonds were secured by a first mortgage, and that this false representation induced plaintiff to part with its property.

(10) If you should find from the evidence in this case that plaintiff, through its agent or agents, made an independent investigation as to the value of bonds and stocks and the condition of the property of the Norfolk & Southern Railway Company as to liens, and acted on such independent investigation, I charge you that you cannot find for plaintiff for any damages whatsoever as a result of fraud or deceit, even though you should be reasonably satisfied from the evidence that defendant

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falsely and fraudulently made the representations complained of with intent to deceive.

RUSHTON, WILLIAMS & CRENSHAW, and HILL, HILL, WHITING & STERN, for appellant. The court erred in overruling defendant's several motions to strike from the several counts the alleged representations as to the stocks and bonds.—113 Ala. 467; *Camp v. Camp*, 2 Ala. 636; *Lake v. Sec. L. Co.*, 72 Ala. 207; 2 L. R. A. 743; 137 Fed. 744; 85 Mass. 380; 40 Am. Dec. 314; 11 Am. St. Rep. 345; 39 L. R. A. 644; 43 Am. Rep. 166; 93 Ind. 591; 72 Ill. 390. The court erred in overruling defendant's demurrers to counts 5, 7, 8 and 9 as last amended.—*Graybill v. Drennen*, 150 Ala. 222; *New Orleans v. Musgrove*, 70 Ala. 428; *Coleman v. Bank*, 115 Ala. 307; *Moore v. Pritchett*, 16 Ala. 785. The court erred in sustaining demurrers to defendant's pleas 3, 4 and 5.—Authorities supra. On these authorities, the court also erred in refusing the charges requested by defendant. The court erred in declining to permit defendant's witnesses to testify as to the value of the property which was transferred.—179 U. S. 116; 132 U. S. 125; 20 C. C. A. 244; 50 N. W. 612; 126 Cal. 628; *Peak v. Derry*, L. R. 37 Ch. Div. 541; s. c. 14 App. cases 337.

T. M. STEVENS and STEINER, CRUM & WEIL, for appellee. As to the right of plaintiff to rely on the representations, and as to his right to maintain this action for deceit, see §§ 2468-9, and 4298, Code 1907; *Lester v. Mayhan*, 25 Ala. 445; *Hafer v. Cole*, 57 South. 757; *Gevin v. Shields*, 52 South. 887; *Tuscaloosa County v. Foster*, 132 Ala. 392; *Prestwood v. Carlton*, 162 Ala. 327; *So. States Co. v. Wilmer Stores Co.*, 60 South. 98; *Brown v. Freeman*, 79 Ala. 406; *Monroe v. Pritchett*, 16 Ala. 785; 82 N. W. 498. When a person puts a state-

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ment into the form of an opinion when he has positive knowledge that his statement is untrue, it is actionable.—60 Am. St. Rep. 390; 132 Am. St. Rep. 487; 75 Maine 55; 64 Am. Dec. 685; 15 L. R. A. 795; 105 U. S. 555; *Brown v. Freeman*, *supra*. A party asserting a fact cannot complain that the other took him at his word.—*Burroughs v. Pac. G. Co.*, 81 Ala. 255; *Crocker v. White*, 162 Ala. 476; *Shanan v. Brown*, 52 South. 737. In any event, under the facts in this case, these questions were all properly submitted to the jury.—*Foster v. Kennedy*, 38 Ala. 359; *Tabors v. Peters*, 74 Ala. 90; *Moses v. Katzenburger*, 85 Ala. 95; 82 N. W. 498.

SAYRE, J.—Smith Sons Lumber Company, a corporation, sued Tillis in an action of deceit. The cause being submitted to a jury on counts 5, 7, 8, and 9, plaintiff recovered judgment. The facts averred in the complaint show a tripartite negotiation for the sale of a sawmill property. Two McGowins and one Boyette, acting together, and to be hereafter for brevity referred to as the McGowins, proposed to purchase the mill property from plaintiff, and to pay the price in money and in large part by the delivery of certain bonds and preferred stocks of the Norfolk & Southern Railway Company, a Virginia corporation, which money, bonds, and stocks they were to get from defendant. To enable the McGowins to effect the purchase, defendant was to advance the money, bonds, and stocks, taking from them a mortgage to secure repayment of the money, and as well the price at which plaintiff was to take the stocks and bonds. The negotiation resulted in a sale on the considerations stated, and, in view of the further facts to appear, the transaction involved the same legal consequences, and may be properly and most conveniently treated for all the purposes of this case, as though Til-

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lis had sold the bonds and stocks to the Smith Company. The further facts alleged and to be considered are, in brief, that plaintiff, stating its ignorance to defendant, inquired of him as to the true value of the bonds and stocks, whereupon defendant, with intent to deceive plaintiff and induce it to accept them at a price greatly in excess of their true value, falsely and fraudulently represented to plaintiff that (counts 5 and 7) "the said bonds and preferred stock were as good as gold," or that (counts 8 and 9) "said bonds and preferred stock were perfectly good," and in addition that (all the counts) "said bonds were secured by a first mortgage on all the property of the said railroad company." Count 5 differs from counts 7, 8, and 9 in this, not to mention other variations of no particular importance: It avers that defendant falsely and fraudulently represented, etc.; whereas, in the other counts, the additional averment is that he knew his representations were false.

By motions to strike certain phrases from the several counts, by demurrer, and by special instructions requested, defendant brought forward his contention that the complaint in its averment of the representation counted upon stated only a case of "trader's talk," or at most a mere opinion, upon which plaintiff had no right to rely.

The alleged false representations as a whole constituted the gist of the cause of action asserted in the several counts, and the question was upon the legal sufficiency of its statement. Those segregated parts against which the motions were directed were not frivolous, scandalous, or unduly prolix, nor were they impertinent, irrelevant, or immaterial to the cause of action as conceived and alleged by the plaintiff. They were proper, if not essential, elements of the case stated, and the

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court correctly refused to mutilate that statement of the case. The proper method of getting defendant's contention in respect to the sufficiency of the counts before the court was by demurrer.—4 Mayf. Dig. p. 496, § 1196 et seq.

The question raised by the demurrer is whether the court can say that the representations alleged, though falsely and fraudulently made, fail to state an actionable wrong. Where statements are made as of fact, especially where they concern matters which may be assumed to be within the knowledge of the party making them and where there is nothing to arouse suspicion, the party to whom they are made has a right to rely upon them without instituting an independent investigation, and, if they be false, it is immaterial that they may have been made without fraudulent intent. They are fraudulent by construction of law.—*Shahan v. Brown*, 167 Ala. 534, 52 South. 737; *Einstein v. Marshall*, 58 Ala. 153, 29 Am. Rep. 729. The difference between the counts, stated above, imports no lack of necessary averment in count 5. The greater generality of that count simply opens to the plaintiff a wider field of inquiry, for, besides covering the case alleged in the other counts, it reaches and adequately states a case, involving identical legal consequences, as for the false statement of material fact made to entrap plaintiff, ignorantly it may be, but with reckless disregard of its truth or falsity.—*Brown v. Freeman*, 79 Ala. 406.

We think it cannot be determined as a conclusion of law on the language used whether the alleged statement of the defendant was the representation of a fact, which he intended should be understood as true of his own knowledge, or the expression of an opinion. That depends upon the surroundings, which in this case, we think, were a proper subject for interpretation by the

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jury.—*Moses v. Katzenberger*, 84 Ala. 95, 4 South. 237; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Andrews v. Jackson*, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402. 60 Am. St. Rep. 390.

For mere "trader's talk" the vendee will not be held to respond either in contract or tort. In *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743, cited by appellant, it is said to be settled: "That the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, * * * and as to which 'it always has been understood, the world over, that such statements are to be distrusted.'" "

And the court added: "The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed."

But the modern tendency is to restrict this license of vendors.

Cases do arise in which the court will say, as matter of law, that the representation made is mere "trader's talk," and an opinion, though implying some knowledge of facts, may be stated under such circumstances that the court will say that the vendee should not have relied upon it. Appellant has cited some such cases. Expressions of opinion as to the future undeveloped uses or value of property, amounting to mere speculation, belong to this class.—*Ansley v. Bank of Piedmont*, 113 Ala. 467, 21 South. 59, 59 Am. St. Rep. 122. And where the parties deal at arm's length, and the vendee is not fraudulently induced to forbear inquires which it may be presumed every competent person would otherwise make for his own protection, expressions of opinion as

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to matters which lie in opinion merely—opinions as to current market values furnishing the most common example—will not constitute ground for an action of deceit, for the reason that the vendee, knowing the nature of such expressions, has no right to rely upon them. He should inquire and examine for himself.—*Camp v. Camp*, 2 Ala. 632, 36 Am. Dec. 423.

“A man who relied on such affirmations, made by a person whose interest might so readily prompt him to invest his property with exaggerated value, does so at his peril, and must take the consequences of his imprudence.”—Kerr on Fraud and Mistake, 84.

But while the value of property is generally a matter of opinion, yet if the purchaser states his ignorance and invites the opinion of the vendor, as alleged in the complaint under consideration, thus in effect giving the vendor to understand that he relies upon that opinion, and putting upon him the onus of confidence imposed and the responsibility of making a definite statement, the vendor is not bound to assume the burden or to answer; but if he does, and his answer exceeds the license of those vague commendations which do not imply untrue assertions concerning matters of direct observation, his answer must speak the truth. Under such circumstances the affirmation of a definite opinion as to value becomes an affirmation of fact, that is, of the fact of a bona fide opinion; and if it is falsely and fraudulently made “to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals as reprehensible as if any other fact were affirmed for the like purpose.”—*Stebbins v. Eddy*, 4 Mason, 423, Fed. Cas. No. 13,342; Kerr on Fraud and Mistake, 87 *Montgomery So. Ry. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60; *Wilcox v. Henderson*, 64 Ala. 535; *Camp v. Camp*, *supra*; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep.

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523. The demurrers to the counts mentioned above were properly overruled.

Whether a representation in the form of an opinion implying some knowledge of facts shall be held for an opinion merely, or was intended for acceptance as a statement of fact, is in general a question to be determined by the jury on consideration of all the surroundings.—*Moses v. Katzenberger, supra; Tabor v. Peters, supra.* So, likewise, whether an opinion has been elicited under such circumstances of confidence as to induce the vendee to forbear independent inquiry is a question for the jury.

Clearly plea 3 stated a good defense, for it contained, among other things, a categorical denial that defendant made to plaintiff any representation of any kind concerning the value of the bonds and stocks. That denial was equivalent to the general issue, which was also pleaded in due form. The error of sustaining the demurrer was harmless.

Pleas 4 and 5 were bad for reasons which may be found in the principles of law stated above in connection with the rulings on the sufficiency of the several counts upon which the case was tried.

Charges 9 and 12, requested by the defendant, sought to limit the inquiry as to fraudulent representations to one certain occasion during the negotiation which led up to the sale. But there was evidence of similar representations made on the occasion when the sale was consummated. Appellant contends that these last alleged representations were made, if at all, after the sale, and his testimony went to support this contention; but the evidence for appellee tended to show that, though the terms of the sale had been agreed upon, yet the agreement was tentative only, that there had been no delivery and acceptance of the bonds and stocks, without which

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there was nothing to suggest that the parties intended the title to pass, that, in short, until the actual delivery the contract of sale rested in negotiation, so that either party was yet at liberty to withdraw entirely or to seek new inducements, and that, while the negotiations were at this stage, plaintiff's agent, acting in the premises for plaintiff, again demanded of defendant further assurance as to the value of the bonds and stock. Defendant's final response, made under those circumstances, in line with the representations charged in the complaint, and similar to those which the testimony tended to show had been made on previous occasions, was relevant and proper for consideration by the jury. These charges were properly refused.

The proposition of charge 10 failed to take account of one certain aspect of the evidence, and was too broadly stated in favor of the defendant. In Pomeroy's Equity Jurisprudence, § 892, the law is stated to be that: If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation, and to have been misled by it. Such claim would simply be untrue."

But it would seem to be clear that if the vendee, after inquiry which proves unavailing or unsatisfactory, goes to the vendor demanding assurance, the question whether he relied on an assurance so obtained must be one for the jury. It appeared that at an early stage of the negotiation plaintiff communicated with its bankers in Mobile, asking them to make inquiry in New York as to the value of the bonds and stocks of the Norfolk & Southern Railway. But it seems that in the memorandum, which plaintiff's agent made at defendant's dicta-

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tion for the purpose of investigation, a mistake occurred in describing the bonds of the railway company, of which there were several issues—though how this mistake occurred, and whether it made any real difference in the value of the bonds, was left in doubt—and that the answer, relating to bonds only, and omitting any reference to stock, indicated a more or less doubtful value, approximating, however, the price demanded and received by defendant. Subsequently plaintiff, according to the tendencies of its evidence, required defendant to make statements as to the value of the stocks and bonds. Defendant denied the alleged representations in toto. Whether plaintiff was justified in relying upon statements elicited under these circumstances as representations of fact or of bona fide opinion, if any were made, and whether plaintiff did in fact rely in material part upon them, or wholly upon information gained from other sources, were questions for the jury. But the charge in question, construed in connection with the evidence, might have misled the jury to conclude the case against plaintiff on the bare fact that it had made the inquiry of its bankers above mentioned. It was well refused.

There is a degree of obscurity in charge 13 requested by defendant arising out of the use of the phrase “as to the value of its property.” If, however, the charge be read as asserting the proposition that the defendant was entitled to a verdict if the plaintiff did not rely at all upon defendant’s representation as to the value of his bonds and stock, and so appellants reads it, it was sufficiently covered by other charges given for defendant and there was no error in refusing it.

Thus far, in discussing the principles of law deemed to underly plaintiff’s asserted cause of action, we have, for mere convenience of statement, treated the transac-

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tion at issue as though it were a sale of bonds and stocks by defendant to plaintiff at an agreed price. For the purpose of the statements already made, this method was not improper or misleading.—*Einstein v. Marshall, supra*. Coming now to the question of the measure of damages and some rulings on the evidence which have been assigned for error, it is necessary in the consideration of the position taken by appellant to have regard for the transaction more precisely as it was. In this connection it is noted that plaintiff and defendant entered into no contractual relations. They each contracted with the McGowins, but not with each other. Defendant, therefore, could be held to respond in damages to plaintiff in an action of tort only, and this on the theory that by the fraud he had induced plaintiff to enter into the trade with the McGowins. In large part the transaction as between the plaintiff and the McGowins was a barter or exchange of properties, and amounted in effect to this, that plaintiff gave its sawmill property in exchange for the McGowins' bonds and stocks, plus a sum of money paid and to be paid. The bonds were taken in the trade at 95, the stock at 80, per centum of their face value. Defendant offered to prove the value of the mill property, and we may assume that his witnesses would have testified that it was worth less than the agreed estimate of its value, viz.: \$200,000. He excepted to the court's adverse rulings. The court, instructing the jury along the same line, laid down the measure of damages as the difference between the represented value of the stocks and bonds and their actual value at the time of the sale, with interest. These rulings are assigned for error.

Appellant's insistence in respect to the proper measure of damages, in an action of deceit by vendee against vendor, is that to make the vendee whole it is only nec-

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essary, and therefore just, that the vendee have the difference between that which he had before and that which he had after the purchase; that is, he should have the difference between the value of the thing purchased and the price paid, or, in case of an exchange, the difference between the value of what he was fraudulently induced to part with and the value of what he got. This may be the rule of the federal courts, of some of the state courts, and seems to be the rule in England.—*Sutherland on Damages*, § 1172; 20 Cyc. 135. But the rule sustained by the great weight of authority in this country is that the vendor must make good his representation as though he had given a warranty to that effect, that damages must be measured by the difference between the actual value of the property at the time of the sale or exchange and its represented value.—*Sutherland*, 1171; 20 Cyc. 132. We think our own cases lend support to this statement of the proper rule.—*Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 56; *Thompson v. Bell*, 37 Ala. 438; *Kelly v. Allen*, 34 Ala. 663; *Gibson v. Marquis*, 29 Ala. 668; *Stow v. Bozeman*, 29 Ala. 397. This rule, evidently, derived from the law of contract, gives the purchaser “the benefit of his bargain,” and is based upon the consideration that in good morals he is entitled to that benefit. Appellant, adverting to the fact that he was not a party to any contract with appellee, urges that as a special reason why the rule of the federal courts should be adopted in this case. But if we are to observe the rule which has become firmly established in the great majority of the courts in this country—and it seems to us to be a very just rule—we can find no sufficient reason for taking this case without its operation. As pointed out in *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 80 N. W. 88, 81 N. W. 118: “The foundation principle upon which all rules for determining damages

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in a case of actionable fraud rests is that the wronged party is to be compensated for the loss he sustained by the fraud to the extent of the natural and proximate consequences of the wrong."

And the difference in the two rules above stated arises out of different conceptions of proximate consequence. The most general conception is that the vendee is entitled to "the benefit of his bargain," and a loss of that benefit is a consequence of the fraud. This transaction was in part a barter of properties; but the rule in such cases is the same as where there is a sale. Defendant was not a party to the contract; but he was in a most material way a party to the negotiation from which it resulted. Even if he had been without interest in the outcome, he would have been responsible for the consequences of a representation known to be false and made to induce the sale. This doctrine is stated in strong language by STONE, J., in *Einstein v. Marshall*, *supra*. But the facts of this case, assuming that the jury correctly interpreted the evidence in accordance with this appellee's contention, take it far beyond the requirements of that doctrine. It is entirely plain that there would have been no contract but for defendant's intervention, and it may be assumed that his course was in part at least controlled by anticipation of advantage to himself. He was making a large investment of cash capital besides the value of his bonds and stocks. He investigated the value of the mill property on his own account. The McGowins were dependent upon him. He was thus in a position to dictate, and did in fact dictate, substantially the entire contract; that is, in the situation of the parties, this particular contract could not have been made without his approval. It seems clear that on the general doctrine of the cases, to which the facts in evidence lend moral weight, plaintiff was en-

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titled to the benefit of the bargain which defendant, according to one tendency of the testimony, has fraudulently helped to impose upon it, and that the trial court, in its rulings on the evidence, and in its instruction to the jury on the measure of damages, committed no error. Our conclusion is that the case was properly submitted to the jury for decision, and that the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

Ex Parte Hudgins.

Assumpsit.

(Decided June 11, 1914. Rehearing denied July 2, 1914. .
65 South. 959.)

1. *Judgment; Opening or Vacating; Insufficiency of Complaint.*—If any count of the complaint stated a cause of action a motion to vacate a judgment on the ground that the complaint stated no cause of action, is properly overruled.

2. *Judges; Official Bond; Failure to Collect Tax; Action.*—The county could sue the probate judge who failed to collect the tax on the mortgage as required by subdivision 7, section 2082, Code 1907, and also the sureties on his official bond for its share of such tax. (Sections 2473 and 5475, Code 1907); since, although the tax was levied by the state, it is levied for the benefit of the county in the proportion of one-third thereof.

3. *Action; Splitting Cause.*—The bringing of such an action for one-third of the tax did not violate the rule against splitting a cause of action, as the failure of the judge to collect the tax created a distinct breach of his duty to the county as well as to the state, giving rise to a separate and distinct injury, each, therefore, having a separate cause of action.

(Mayfield, J., dissents.)

CERTIORARI to Court of Appeals.

[Ex Parte Hudgins.]

Pickens County sued L. C. Hudgins, and his official bond, for the failure to collect a certain mortgage tax, and had judgment thereon. Defendant moved for an order to vacate such judgment and appealed to the Court of Appeals from a denial of such motion. The Court of Appeals affirmed the action of the lower court, and Hudgins petitions for certiorari to revise such judgment. Writ denied.

See *Hudgins v. Pickens County*, 10 Ala. App. 377, 64 Ala. 472.

OLIVER, VERNER & RICE, CURRY & ROBINSON, and J. MANLY FOSTER, for appellant. Only the state may sue the judge of probate for a failure to collect the taxes required on the filing of a mortgage for record.—General Acts 1903, p. 327. The duty is not divisible, and to allow a recovery for one-third of the amount would be allowing the splitting of the cause of action.—*K. C. M. & B. v. Roberson*, 109 Ala. 296. As to other matters insisted on, see brief of attorneys for appellant in the report of this case in 10 Ala. App. 377.

PATTON & PATTON, for appellee. For brief of counsel, see report of this case in 10 Ala. App. 377.

GARDNER, J.—From the order of the trial court overruling motion of defendants in case of *Pickens County v. L. C. Hudgins, et al.*, 10 Ala. App. 377, 64 South. 472, to have set aside and vacated the judgment rendered against said defendants, petitioners herein prosecuted an appeal to the Court of Appeals, and the judgment of the court below was there affirmed. This ruling of the Court of Appeals we are asked to review.

The complaint contained four counts stating in various manner the cause of action. The insistence of peti-

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tioners is that the complaint states no cause of action, and therefore the judgment is void and should be vacated. Confessedly, of course, if any one count of the complaint states a cause of action, then the rulings of the court are correct.

The suit is by Pickens county and against the judge of probate of said county and his official bondsmen, and counts upon a failure of the said probate judge to collect the tax properly due upon the filing for record of a certain mortgage. For convenience we here copy a portion of the fourth count of the complaint, omitting what we deem immaterial for this purpose: "And plaintiff avers that the defendant L. C. Hudgins did fail to discharge the duties of judge of probate for said Pickens county, Ala., in this, that on, to wit, the 6th day of December, 1906, there was filed with the defendant L. C. Hudgins, as judge of probate, for said Pickens county, Ala., a mortgage, deed of trust, or instrument in the nature of a mortgage or deed of trust, given to secure the payment of \$1,500,000 by Alabama, Tennessee & Northern Railway Company to Knickerbocker Trust Company, trustee, conveying real estate and personal property situated in the state of Alabama, that said mortgage, deed of trust, or instrument in the nature of a mortgage was received for record by defendant L. C. Hudgins, and recorded in record of mortgage book 46, on pages 1 to 32 inclusive; that said defendant, L. C. Hudgins, as judge of probate for said county, failed and refused to collect the tax provided for in section 2082, subd. 7, of the Code of Alabama for 1907, or in section 3911 of the Code of 1896, and has wholly failed to account to plaintiff for its part of the mortgage tax due under said mortgage; wherefore this suit."

By subdivision 7 of section 2082 of Code, 1907, it is provided that no mortgage, deed of trust, etc., shall be

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received for record without the payment of the privilege tax of 15 cents for each \$100 of indebtedness or portion thereof secured thereby. The official duty is therefore clearly placed upon the judge of probate to receive and record the said mortgage, deed of trust, etc., when the tax is paid and equally clear is his duty not to receive the same for record until said tax is paid. He receives compensation of 5 per cent. of the amount collected for such services. By subdivision 7(E) it is provided that of the taxes thus collected by the probate judge there shall be paid to the county treasurer of the county in which such taxes are collected one-third of the amount collected by him, to be accounted for by him, and the remaining two-thirds to the state treasurer.

The county is therefore to receive one-third of this tax, and, as we have seen, it is the duty of the judge of probate to collect the same and not to receive for record the said instrument until and unless said tax is paid.

It is insisted by counsel that this tax is levied by the state and the omission of the probate judge to collect the same was a violation of the duty that he owed to the state, and for this reason that the action could not be maintained by the county.

We do not agree. True, the tax is levied by the state. Indeed, all taxation either comes directly from the state or through some subdivision of the government receiving authority from the state. In either event the state is the fountain source of taxation. In the instant case the tax is levied for the benefit of the county one-third thereof, for the benefit of the state two-thirds thereof, just as much so as if it had been so written in so many words. We are of the opinion that the case of *State v. Adler*, 123 Ala. 87, 26 South. 502, cited in opinion of the Court of Appeals, fully supports the conclusion there reached.

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By section 2473, Code, it is provided that for any breach of an official bond of any officer of this state the person aggrieved may sue in his own name, assigning the appropriate breach.

Section 5415, Code 1907, provides that all bonds given by judges of probate may be sued on by any one sustaining an injury by reason of any neglect or omission of such officer to take sufficient surety from executor, etc., or by failure of such judge to perform any other official duty.

We do not think the authorities cited by counsel as to splitting up a cause of action are applicable here. It is the duty of the judge of probate to collect this tax, one-third for the benefit of the county and two-thirds for the benefit of the state. A failure and refusal on his part to do so (as alleged in said count 4) creates a distinct breach of duty to the county and to the state, giving rise to distinct and separate injury, and each therefore being a separate cause of action. Otherwise, and if insistence of counsel be followed, then should the probate judge receive and collect and pay over to the state only the two-thirds of the tax which is for the benefit of the state, and fail and refuse to collect the one-third for the county, then the latter would be without remedy for such breach of official duty, though suffering the loss of the one-third of said tax.

The foregoing expresses the views of the majority of the court. Justice MAYFIELD dissents and expresses his views in his opinion which follows. He does not seem, however, to rest his dissent upon the line of argument followed by counsel for petitioner, but rather upon the theory that the county has no rights whatever until the tax is actually collected, that the probate judge is acting exclusively for the state and not for the county, and that in this matter he owes no duty to the county until

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the money is actually collected. Of course, we fail to see the force of this reasoning. We have shown it is the duty of the judge of probate to collect this tax and pay this one-third thereof to the county, and it is his duty not to receive the instrument for record until the tax is so paid. For this he receives compensation. It certainly must be admitted that his failure and refusal to collect the tax constitutes a breach of his official duty. Any person aggrieved may sue for such breach. The state has levied this tax, one-third thereof for the benefit of the county. We are wholly unable to see how it can be contended that the county for whose benefit the one-third of that tax is levied is not interested in seeing to it that the tax is in fact collected. Surely the quantity of the tax can have no bearing upon the logic of the case. Therefore, had this subdivision provided that all of the tax should be paid to the county, could it then be said that the county had no interest in the same until actually collected? Clearly not. The fact that a portion only goes to the county and a portion to the state clearly should not change the logic of the situation. As shown previously herein, if this reasoning be followed, then the judge of probate could only collect two-thirds of the tax and pay the same over to the state. The state would then be satisfied in law because paid in full and could not complain. He may then fail and refuse to collect the one-third due the county. The county reads the provision of the law whereby it is said that it is the duty of the probate judge to collect the whole tax and pay over one-third to the county, and yet the dissenting opinion says to the county that it has no rights, no interest, because the money has not been actually collected. Little comfort here for the county; yet this is, as we view it, the logical result of the views as therein expressed. The dissenting opinion asks, "How can the

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county have a remedy until it has a right?" The answer of course is that the county has a right, has an interest, in the discharge of this official duty, the collection of this tax, and is injured by a breach of this duty, and it is our opinion the views of our dissenting Brother would lead to a denial of a remedy for this right.

True the history of this case, as presented by the record, and former disposition of the same (*Hudgins, et al. v. Pickens County*, [App.] 62 South. 995), might disclose that a hardship will result from the conclusion here reached. We do not think this result can be said to follow as the fault of the law or the courts. With this, however, of course, we cannot here be concerned. It is an expression, often used that "hardships make shipwreck of the law." We have here but one duty, and that is to declare the law, and this is resolved here into one question; that is, whether or not any one count of the complaint states a cause of action. If so, then we have no other duty to perform save to deny the writ. This is our conclusion.

Writ denied. All the Justices concur, except MAYFIELD, J., who dissents.

MAYFIELD, J.—(dissenting).—It is here decided that a county can maintain an action against a probate judge for a failure to collect the full amount of taxes for recording a mortgage provided for by subdivision 7 of section 2082 of the Code. I do not believe this is now the law, or that it ought to be the law, and I cannot concur.

This is not an action to recover taxes. It is an action to recover damages from an officer for failure to collect taxes. The cause of action is in tort. The form of action is *ex contractu*; but the cause of action is *ex delicto*.

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This mortgage tax is not levied by the county nor by the probate judge; it is levied by the state; but the law requires the probate judge to collect and distribute it, a part to the state and a part to the county. It is the state that enjoins the duty of collecting, and not the county. The county has no right, duties, or liabilities, as to the collecting of this tax. It is levied and collected as a state tax and not as a county tax. It is true that after it is collected a part of it is disbursed to the counties in which the property mortgaged is situated. Until the tax is collected, the county has no interest, rights, duties, or liabilities. It cannot compel the collection of the tax, because the collection is the inception of the county's rights in the premises. To hold otherwise would be like holding that a child may sue its parent for failing to collect, or to make money, on the ground that if the parent had collected or made the money the child would be given a part of it.

The probate judge, in ascertaining the amount of the mortgage tax, and collecting it, is acting wholly and exclusively for the state and not for the county. In this matter he owes no duty to the county. After he collects the money, he does owe a duty to the county of paying into its treasury one-third of the tax; but that duty does not and cannot arise until the money is actually collected.

The only breach of duty alleged or attempted to be alleged, in any count of the complaint, is in the failure to collect the tax. The duty owing for this is, by law, exclusively to the state; there is, and can be, no duty owing the county, as to ascertaining the correct amount and collecting it. His official bond does not make the probate judge or his sureties liable for anything, for which the judge would not be liable without a bond. As was said in *Irion, et al. v. Lewis*, 56 Ala. 195, it was not

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the intention of the Legislature to increase the officer's liability to civil suits in requiring official bonds, nor does the bond make that actionable which would not be actionable, but for the bond. The sole effect of the bond is to make the sureties liable for certain wrongful acts or derelictions of the officer. The bond never adds to or increases the liability of the officer, but only makes the sureties civilly liable for some of his wrongful acts.

Suppose there was no official bond in this case would any one ever suspect, much less decide, that the county could sue the probate judge in tort for failure to discharge his public duty of correctly ascertaining the amount of the mortgage tax and of collecting it in full? If the county cannot maintain such an action of tort against the probate judge, then it cannot maintain an action on his official bond, when the only breach attempted to be alleged is the self-same tort.

The mere fact that the action is *ex contractu* does not change the result. The real and only cause of action is the alleged tort of failing to collect the money. The officer is certainly under no contract with the county to so collect such taxes; neither does he owe the county any such duty.

If the mere fact that the county would have received a part of the tax had it been collected gives it a right of action, then every person in the state or the county who would have received a part of it could, for the same reason, maintain a like suit. The damages in such a case are too remote to be recoverable.

The controlling factor in the case is entirely overlooked by the court; and that is that the very inception of the county's rights is the collection; that until the money is actually collected by the probate judge the county has no right or color of right—that it is the actual collection which confers the right. How can the county

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have a remedy until it has a right? The law is that where there is a right there is a remedy. The effect of this decision is to hold that, where there may be or might have been a right, there is now a remedy. This is a dangerous precedent, and ought not to be set or followed.

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Assumpsit.

(Decided June 30, 1914. 66 South. 7.)

1. *Arbitration and Award; Action on Award; Right.*—Where there has been no agreement on arbitrators, and the persons assuming to act as such have made only a partial statement of the account between the parties, there can be no recovery on the alleged award, although there has been an attempted mutual waiver of technicality.

2. *Appeal and Error; Review; Finding of Court.*—Where the evidence is conflicting and the trial was by the court without a jury, the finding of the court will not be reversed on appeal unless clearly against the great weight of the evidence.

3. *Same; Presumption.*—Where the bill of exceptions recites that it does not contain all the evidence, it will be presumed on appeal that the evidence not included in the bill of exceptions supported the finding of the trial court.

APPEAL from Talladega City Court.

Heard before Hon. CECIL BROWNE.

Assumpsit by T. W. Reid against G. T. McElderry on the common counts and on an award. Judgment for defendant and plaintiff appeals. Affirmed.

RIDDLE & BURT, for appellant. The plea of set-off was proper in this action.—*Drennen v. Gilmore*, 132 Ala. 248. The court should set aside the verdict.—*Dargan v. Harris*, 68 Ala. 144; *L. & N. v. Solomon*, 127 Ala. 189.

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HARRISON & WELCH, for appellee. The bill of exceptions shows that it omits certain evidence, and it will be presumed that such evidence sustained the finding of the lower court.—*Shafer v. Hausman*, 139 Ala. 237. The court will not set aside the finding of the trial judge unless it clearly appears to be erroneous.—*Montgomery v. Massey*, 159 Ala. 437; *Bass & Heard v. Clements*, 60 South. 443.

SAYRE, J.—Appellant sued appellee on the common counts for services rendered and for goods and merchandise furnished during the year 1912. There was a count also which seemed to proceed as upon an award by arbitrators. Appellee denied any indebtedness and the case was tried by the court below without a jury, the parties by their counsel having agreed that “all technicalities be waived.”

It is clear upon the evidence that appellant could not recover upon the award alleged for the sufficient reason, which appellant's testimony goes to show, not to mention that of appellee to the same effect, that there was no agreement upon arbitrators, nor did the persons who assumed to make a statement of the account between the parties, acting evidently under a misapprehension as to their selection for that purpose, do more than make a partial statement, that is, they stated that appellee was indebted to appellant in a sum stated, subject to certain credits the amount of which was not stated. This, of course, was no award, nor did it tend to establish anything as by legal evidence. We have referred to it, however, as if it were entitled to consideration, for the reason only that appellant appears to rely upon it, and upon the fact that appellee's son was one of the persons who assumed to make the statement, as greatly persuasive of the moral status of a controversy that was tried

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out without regard to technicalities. The investigation was made by these persons without hearing from appellee, and the authority and correctness of its conclusion were by him promptly challenged. The so-called award was in and of itself evidence of nothing, nor did the mutual and well-intended, though mistaken, waiver of technicalities give it any better standing as an instrument of proof.

As for the merits of the controversy, so far as we have been able to extract them from the confusion into which the avoidance of technicality has left the record, they depended in essential part upon the testimony of appellant and appellee. These parties, testifying for themselves, were in conflict, the testimony of each going to sustain his own side of the controversy. The record affords no insight into the credibility of these parties such as the trial judge before whom they testified may have had, and the judgment below might therefore well be sustained on the ground that, so far as we can see, appellant failed to sustain the burden of proof which rested upon him.

Furthermore, the bill of exceptions contains a recital that: "The foregoing was substantially all of the evidence in this case, and all the evidence tended to show, with the exception of certain papers and commissary account book shown by bill of exceptions to have been offered in evidence."

The main difference between the parties arose out of the business carried on at the commissary. The commissary account book was kept by appellant and showed, or should have shown, the principal matters of difference between the parties. This state of the record brings into view two closely related considerations either of which affords ample ground for our conclusion not to disturb the judgment under review: (1) The judgment

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of the trial court has the force and effect of a jury finding, and cannot be reversed in the absence of a clear showing that it is against the great weight of the evidence; (2) the presumption must be indulged that the omitted evidence gave support to the finding of the trial court.—*Shafer v. Hausman*, 139 Ala. 237, 35 South. 691, an dcaes there cited.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

Winter v. Pollak.

Assumpsit.

(Decided June 11, 1914. Rehearing denied July 25, 1914.
66 South. 11.)

1. *Payment; Evidence; Burden of Proof.*—The administrator of a deceased attorney suing for services rendered by the attorney has the burden of proving that the services were rendered and that they had not been paid for in whole or in part.

2. *Same; Jury Question.*—Under the evidence in this case it was a question for the jury whether the services rendered by the attorney for which his administrator was suing had been paid.

APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

Assumpsit by Sallie Winter as administratrix, against Ignatius Pollak. Judgment for refendant and plaintiff appeals. Reversed and remanded.

W. A. GUNTER, for appellant. Payment is confession and avoidance, and of course, must be proved by the party affirming it.—3 Brick. Dig. 433. The granting of the motion to exclude plaintiff's evidence was error, if

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on any theory of the case the jury could have found for plaintiff.—97 Pac. 709; 142 U. S. 134; 6 Enc. P. & P. 444, 944-9, 951-2.

J. B. BROWN, for appellee. This cause should be affirmed on the authority of the former appeals in this case.

MAYFIELD, J.—This is the third appeal in this case. See 166 Ala. 255, 51 South. 998; 52 South. 829; 53 South. 339, 139 Am. St. Rep. 33; 173 Ala. 550, 55 South. 828. It was held on both of the other appeals that the plaintiff failed to make out a prima facie case. The decision on each of the other appeals was that there was no evidence to show that the plaintiff's intestate had not been paid for his services rendered the defendant as an attorney at law. The fact that such services were rendered, with the value thereof, was proven, but there was held to be no affirmative proof that they were not paid for when rendered, or when due to be paid for; and that the burden of proof, in a case like this, is on the plaintiff to show that the services have not been paid for.

Counsel for the plaintiff has earnestly and ably contended that the decision of this court on the former appeals was wrong as to the burden of proof, in such cases. This question has been five times considered by this court in this case, and the question has been each time ruled against the appellant. We deem it settled, so far as this court is concerned, and that it will subserve no good end to further discuss it.

The majority of the members of the court are of the opinion that the decision in this case is in accord with other prior decisions of this court to the same effect, and that the decisions are correct and should not be overrul-

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ed. As has been shown in former opinions rendered in this case, the authorities are in conflict on the question; and, as it is a rule of evidence, it is better to adhere to the rule as declared by this court, though there be authorities to the contrary.

On a thorough and careful examination of all the evidence offered by the plaintiff on the last trial, we have reached the conclusion that there was sufficient evidence to carry the case to the jury; that plaintiff's intestate had not been paid in full for his services shown to have been rendered to the defendant. A great number of letters written by the defendant to plaintiff's intestate and to W. A. Gunter, who was associated with plaintiff's intestate, were offered in evidence. These letters were written during the year 1903; the first being dated February 28th and the last November 11th. During this entire period, according to these letters, plaintiff's intestate was at work for defendant, who was constantly calling on his attorney to do more. These letters all show that, from the beginning of the services rendered him until the close thereof, the defendant was in dire financial straits; that his property was tied up in gremio legis; that most of the services rendered by plaintiff's intestate were in attempting to have the property released from the clutches of the law and from defendant's creditors. The first letter contains this statement: "I asked Mr. Curtis to advance \$200, which he declined. I am broke." He was even then calling on plaintiff's intestate for services. In that letter defendant touches on matters which he had with Dr. Morrow and with Mr. Chambers, and calls on his attorney for all kinds of services, going on to state that he was broke and could not get an advance of \$200,, and asking the attorney to see Mr. Pinckard, so that the client could obtain a few dollars by the 15th, when he would collect some

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rents. On March 4th the defendant wrote to Mr. Gunter to see plaintiff's intestate, requesting that they both again urge Moore to decide. In this letter he says that he could do nothing, in some other cases which he had, because he could not expect his attorneys to work when he could not see his way clear to pay them; but, that, if Mr. Gunter would take the chances, he would make out a statement and give him the facts. On this last-mentioned day defendant also wrote Judge Winter that he was ruined by the delay of Moore; that he had not a dollar in sight, and urging Judge Winter to have Moore decide. On May 5th defendant wrote Judge Winter: "To send you the \$100 is out of the question. Where am I to get it? But I am trying to sell the Chambers property, and I think with good prospects. * * * If you will push this matter, we will have some money soon."

On May 7th he wrote a letter urging Judge Winter to help him in the Moore matter, and in others also, and on May 15th wrote another letter urging his attorney to attend to other matters for him. On June 1st defendant writes and urges Judge Winter to try to have the property released, so that he could raise money; and again, on August 19th, defendant urges his attorney to try to procure a loan for him, on some lands in Crenshaw county which were not attached by his creditors, offering to pay a commission of 10 per cent., and saying, "Every little thing helps now." On September 10th he calls on Winter to advise as to defendant's right to redeem certain property. In this letter he refers to other matters which Winter is attending to for him; and concludes: "I know that these matters are trying to you, since you receive no money, but I am obliged to see them attended to in order to enable me to protect my family and my creditors."

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On September 11th he wrote Judge Winter that he appreciated the situation, and said, "I beg you to feel no hesitancy to quit;" and wrote him again, on November 11th, referring to the fact that Judge Winter had been to Washington to see Moore for defendant, and stating that it was with difficulty he had raised \$50, and that he was sick and was without means of support on account of Moore's delay. This letter, which is the last, he concludes by saying that: "As soon as we can get a decision, I will come to see you so that we may go on with other matters."

These letters, we think, were sufficient proof that defendant had not paid Judge Winter for his services, to carry the question to the jury.

The action is on the common counts for work and labor done. The proof is undisputed that Winter performed the services, and there was proof as to what the services were worth. The only thing lacking was proof that the services had not been paid for. Death has closed the lips of the man who performed the services, and the law has closed the lips of the man for whom they were performed. On this account the proof cannot be made as certain, as to payments, as in ordinary cases. The necessities of the case require that other proof than the oral testimony of the parties to the transactions be resorted to. The correspondence between the parties, together with the checks, receipts, and other memoranda as to the transactions, is the very best proof available.

The action is not on any particular contract, nor for any particular services, but is on the common counts generally, for work and labor done. While the only parol proof as to services rendered was as to having the property released which was attached by Billing, and which was referred to Moore to arbitrate and de-

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cide, yet the letters show that Judge Winter did other services for the defendant, though there is no proof as to the value of such services.

While, as before stated, we think the letters sufficient to carry the question of nonpayment to the jury, they do not show, of course, that the defendant was Winter's debtor for any particular amount, or that that particular amount was not paid; but the parol proof showed what the services were worth, and, if they were not compensated for, then, of course, the relation of debtor and creditor did exist. These letters, we think, do show, or at least make it a question for the jury, that the services were not paid for in full by the defendant, and that he yet owes something therefor. We do not mean to say that the proof is conclusive as to any amount; that is made a disputed question of fact; and the proof was sufficient to carry it to the jury. While all of these letters were offered and introduced on the second trial, and were in the record when the case was decided on the second appeal, they were not treated in the opinion nor considered in deciding the case.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ.,
concur.

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Continental Casualty Co. v. Cunningham.

Assumpsit.

(Decided May 21, 1914. Rehearing denied July 25, 1914.
66 South. 41.)

1. *Insurance; Accident; Intentional Act of Third Person.*—Where a party had intelligence enough to understand the nature and consequences of his act, and the act was voluntary and resulted in physical injury to the person of the insured, such injury was the result of an intentional act within the policy limiting liability for injuries caused by the intentional act of another.

2. *Same.*—Where the policy limited liability where the injury resulted from the intentional act of a third person, and the evidence showed that the insured was shot by a third person undisputedly, and there was evidence that at the time such third person was drunk, and also evidence as to the degree of his drunkenness, the question of his capacity to do an intentional act was for the jury.

3. *Same.*—Where insured was shot by a third person who was fleeing from arrest and who shot at every one interfering with his flight, his act in shooting insured, a police officer attempting to prevent his flight, was an intentional act to kill insured, whether insured was known to such third person, or whether knowing him, such third person mistook him for someone else whom he intended to shoot, within the policy limiting liability for the intentional act of a third person.

APPEAL from Calhoun Circuit Court.

Heard before Hon. HUGH D. MERRILL.

Action by Mary Bee Cunningham against the Continental Casualty Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The assured was a police officer of the city of Anniston, and was shot and killed by one McGuffin, under the following circumstances: On Sunday afternoon, June, 1911, the Anniston chief of police, accompanied by the sheriff, went into the house of McGuffin to arrest him. He was sitting on the porch with an army rifle across his lap and his pistol in his hand. When the chief of police accosted McGuffin, he raised his gun and fired,

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whereupon the chief began firing, and both emptied their guns at each other. The officers then retired, the chief being wounded, and McGuffin also went off in another direction. Other officers pursued him, and he carried on a running battle, loading and firing at his pursuers. After going several blocks, he was seen by Policemen Cunningham and Dashwood, and Cunningham went around in front of McGuffin, and, when within about 15 feet of him, threw up his hands, saying: "Hold on, friend; wait a minute." Thereupon McGuffin raised his gun, aimed directly at Cunningham, and shot him through the head. Dashwood who had remained about 40 yards away, fired at McGuffin as he walked away, and McGuffin returned his fire at intervals when the officer exposed himself to view. As McGuffin proceeded, he saw an automobile, towards which he ran firing his pistol. Its occupant got out, and McGuffin got into the machine, and, while attempting to start it, was shot and captured. A number of witnesses for plaintiff testified as to McGuffin's condition at or about the time of the killing, stating variously that he looked like he was drinking, he was drinking some, he was pretty full, was staggering, talked like a drunken man, looked like a drunken man, appeared to be drinking pretty heavy, from the way he talked there, and the way he was acting. There was also evidence of drunken conduct by McGuffin shortly before the incidents which led up to the killing of Cunningham. The complaint avers that insured was accidentally shot, while defendant pleads that he was shot by the intentional act of McGuffin.

The policy provides as follows:

Part VI—B. If any of the losses covered by this policy (1) where the injury causing the loss results wholly or in part from voluntary exposure to unnecessary or obvious risk of injury, or from the intentional act of

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the insured or any other person, * * * then * * * the amount payable to be one-fifth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding.

The only question involved as to defendant's liability is whether or not it is limited under the quoted provision to one-fifth of the face of the policy. On the issue submitted by the trial court to the jury, their verdict was for plaintiff for the full amount of the policy. The material assignments of error present for review the propriety of the several charges given for the jury at the instance of plaintiff, and the refusal of a number of charges requested by defendant, all of which sufficiently appear from the opinion.

KNOX, ACKER, DIXON & STERNE, and M. P. CORNELIUS, for appellant. A man's act in killing another is not rendered unintentional by reason of the fact that he does not know who his victim is.—*Orr v. Travellers I. Co.*, 120 Ala. 647; 8 S. W. 570; 88 Fed. 38; 112 N. W. 1065; 61 Ill. App. 565; 127 U. S. 661; 102 S. W. 773; 124 S. W. 331; 65 Mich. 545. The intoxication of the assailant would not render his acts unintentional.—*Englehart v. State*, 88 Ala. 100; *Dotson v. State*, 62 Ala. 141; *Stein v. Stae*, 37 Ala. 137. There was no evidence that McGuffin was too drunk to form a design.—*McGuffin v. State*, 59 South. 635.

WILLETT & WILLETT, and BLACKMON, MERRILL & WALKER, for appellee. Cunningham was accidentally killed within the terms of the policy here sued on.—*Equitable I. Co. v. Osborn*, 90 Ala. 201; *Nat. L. I. Co. v. Lackey*, 160 Ala. 178; 59 Am. St. Rep. 474; 42 L. R. A. 189; 127 U. S. 661. The duty was not on plaintiff to negative

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death or accident from the accepted causes embraced in the policy, she having made out a prima facie case under her complaint.—55 L. R. A. 538; 4 L. R. A. (N. S.) 636; 142 U. S. 116; 1 Cyc. 290. The presumption of the law is that McGuffin's act was not intentional, as suicide and murder are never presumed.—1 Cyc. 289 and cases cited; *Standard L. I. Co. v. Jones*, 94 Ala. 434; *Pumphrey v. State*, 156 Ala. 103. Insurance policies are construed most strongly against the insurer, and in favor of the insured.—*National L. I. Co. v. Lokey*, 166 Ala. 174; 54 Am. St. Rep. 900; 120 U. S. 742.

SOMERVILLE, J.—The primary question presented by this appeal is upon the interpretation and construction of that clause of the insurance policy which limits the amount payable thereunder to one-fifth the face of the policy “where the injury causing the loss results wholly or in part * * * from the intentional act of the insured or any other person.”

What is an “intentional act” may seem a matter of very simple solution to the intelligent layman, but to the judge who is familiar with the learning of the books, and who ventures into the metaphysical subtleties which incumber judicial definition, the question is full of difficulty.

In its present application, the phrase ought to be given that simple and common sense meaning which the parties to the contract intended it should express.

Obviously, we think, this meaning is not to be determined upon a consideration merely of the criminal responsibility of the actor, nor of his moral accountability according to the refined principles of psychology.

If the actor has intelligence enough to understand the physical nature and consequences of his act, and, without the compulsion of an irresistible physical force or

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of an irresistible insane impulse, consciously directs his action so that the injury of the insured is the natural or probable consequence thereof, then that injury is the result of an intentional act. Of course, the injury of the person must be intended, as well as the act which causes such injury.—*Orr v. Travelers' Ins. Co.*, 120 Ala. 647, 652, 24 South. 997. But it must always be presumed that injury which is the natural or probable result of the conscious and voluntary application of unlawful force to the person of another was the intended result of that action.

It follows, from what we have said, that either the insanity or the drunkenness of an actor may be of such a degree as to lead to the conclusion that an act in question was not his intentional act.

Where, as here, the evidence tends to show not only the drunkenness of the actor causing the injury, but also the degree of his drunkenness, and exhibits also contemporaneous conduct of an equivocal character, his capacity to do an intentional act is very clearly a question of fact for the jury.—*Armor v. State*, 63 Ala. 173; *King v. State*, 90 Ala. 613, 8 South. 856. See, also, *Snead v. Scott*, 182 Ala. 97, 62 South. 36, 39. The trial court properly submitted this issue to the jury. But the capacity of McGuffin, the slayer of the insured, to form a specific intent to kill him, is not an accurate test of his capacity to do an intentionally injurious act; nor was the entertainment of such an intent by McGuffin an essential element of an intentional injury to the insured—as seems to have been stated to the jury by the trial judge.

In a number of charges given at the instance of plaintiff, and also in his oral charge, the trial judge instructed the jury in effect that the killing of Cunningham, the insured, by McGuffin, was not intentional unless Mc-

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Guffin shot and killed him knowing him to be John L. Cunningham; and also that, if McGuffin shot him believing him to be some other person, the restrictive provision of the policy was not applicable, and plaintiff was entitled to recover the full amount of the insurance.

We are indebted to the briefs of counsel for a full and helpful discussion of this theory of the case. Upon very thorough consideration we are entirely convinced of its unsoundness. We find no warrant in the language of the policy for such narrow and exacting construction of the phrase "intentional act." We think it is wholly immaterial whether or not Cunningham was known to McGuffin, or whether, knowing him, McGuffin mistook him for some one else whom he intended to shoot. If in fact, having the requisite mental capacity, he intended to shoot the human being who accosted him and threatened to obstruct his flight, his act was an intentional act, and the killing was an intentional result, no matter what he may have supposed was the name or personal identity of his victim. Such a shooting is in no sense accidental so far as the assailant is concerned, and it falls within the restrictive language and purpose of the contract.

We infer that the trial judge was influenced to his conclusion by the case of *Utter v. Travelers Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913. The principle of that case is illustrated by the first headnote of the report: "An accident insurance policy contained a condition exonerating the insurer from liability, if the death of the assured was the result of design on the part of the assured or any other person. The assured was shot by an officer; but there was some evidence tending to show that the officer did not know it was the assured at whom he shot and that he did not intend to kill the assured. Held that if this evidence were true it

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could not be said as a matter of law that the assured lost his life from the design of another."

Morse, J., writing the opinion, said: "It seems to me that the design intended by the terms of this policy must be the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. If, when Berry fired this shot, he did not know the man he fired at was Utter, and did not intend to kill Utter, it cannot be said that Utter lost his life by the design of Berry."

It might be difficult, if not impossible, to refute the logic of the reasoning upon which the decision in the *Utter Case* is founded. That case, however, is decisively distinguished from the present case by the language of the policy there construed. The liability requirement that the death or injury of the assured should not be the result of design is obviously of narrower import than a requirement (as here) that it should not be the result of an intentional act. If the *Utter Case* is not thus distinguishable from this case, we are constrained to regard it as unsound.

So far as the facts of the present case are concerned—assuming that McGuffin had the mental capacity to do an intentional act—there is no support for the theory that he supposed he was shooting at some particular person other than Cunningham. On the contrary, it clearly appears that he was fleeing from arrest, and that he was shooting at anybody and everybody who interfered with his purpose to get away. Hence the principle of the *Utter Case*, even if abstractly correct, could not be applied in this case. A possible supposition is not the equivalent of a reasonable inference from the evidence.

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The views above expressed will be a sufficient guide to the trial court upon another trial. Without noticing in detail all of the instructions given or refused, it may be well to observe that charges 11—a, 15—A, and 15—B are correct statements of the law applicable to the evidence, and they should have been given as requested by defendant.

For the errors pointed out, the judgment will be reversed, and the cause remanded for another trial.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ.,
concur.

Brown, Ins. Commissioner v. Protective Life Insurance Company.

Assumpsit.

(Decided June 30, 1914. Rehearing denied July 25, 1914.
66 South. 47.)

1. *Taxation; Exemptions; Instructions.*—A total or partial exemption must be expressed in clear and unambiguous terms, and may not be deduced from language of doubtful import; hence, a statute creating an exemption from taxation, or substituting for the benefit of particular parties taxation less onerous than that which others bear, must be strictly construed.

2. *Same.*—Under Revenue Acts of 1911, section 4. Acts 1911, p. 163, taxes imposed on the property of such insurance by counties, cities or towns, cannot be deducted from the state tax; especially in view of section 33-F thereof, and the further provisions of section 4. as the legislature in adopting the provisions in question was dealing with a state tax only.

3. *Statutes; Construction; Entirety.*—In construing a clause or provision in a revenue bill, all the sections and provisions of which became a law at the same time, the whole bill should be read, and each section thereof construed as continuous sections of the same act, in harmony with the other sections, so as to give effect to each without rendering any section nugatory if practicable.

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APPEAL from Montgomery City Court.

Heard before Hon. W. W. PEARSON.

Action by the Protective Life Insurance Company against Cyrus B. Brown, as Insurance Commissioner of the State, for money had and received. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The following is the agreed statement of fact:

That the Protective Life Insurance Company, hereafter called "plaintiff," has paid taxes to the county of Jefferson in the state of Alabama, for the years 1911, 1912, and 1913, amounting in the aggregate to the sum of \$1,273.29. That plaintiff had paid to defendant, as Insurance Commissioner of the state of Alabama, for the same years on account of taxes provided in section 4 of the act of the Legislature entitled an act to further provide for the revenues of the state of Alabama, approved March 31, 1911, a sum equal to \$1 on each \$100 of the gross premiums received by it in this state during the years ending on the 31st day of December preceding, less the return premiums which are mentioned in section 4, and less the state taxes which it paid on its property for the years above mentioned. That the above-mentioned sum (\$1,273.29) was paid by defendant to plaintiff as Insurance Commissioner of the state of Alabama, on April 1, 1914, said payment being made under protest after a demand had been made by defendant as Insurance Commissioner on plaintiff for the same, and had accompanied said demand with a threat of suits and penalties. That if plaintiff has the right under said section 4 to deduct, from the taxes which it shall pay, an amount equal to the county taxes which are paid by it in this state for the preceding year, plaintiff is entitled to a judgment for the amount sued for, and, if plaintiff has not the right to make such reduction, a judgment shall be rendered for defendant.

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ROBERT C. BRICKELL, Attorney General and T. H. SEAY, Assistant Attorney General, for the State. This appeal brings into review a construction of section 4, Acts 1911, p. 159. An almost parallel cases to the one here at bar is that of *Lindsey v. U. S. S. & L. Co.*, 127 Ala. 366, in which it was held to the effect that there was no intention on the part of the Legislature to alter the operation of the act amending the section of the Code.—*Lunsford v. Duncan*, 71 Ala. 609; *Bradley v. State*, 69 Ala. 322. It follows, therefore, that the domestic insurance companies are not entitled to deduct from their state taxes the amount of taxes and license collected by the counties, towns and cities of the state.

THETFORD, BLAKEY & STRASSBURGER, for appellee. Where a material alternation appears in the language used, it will be presumed that the Legislature intended a different meaning.—*Lehman v. Robinson*, 59 Ala. 219. The word "taxes" means state, county and municipal taxes.—50 South. 609; 1 S. & R. 62; 3 Har. 11; 7 Ired. 55; 41 N. J. L. 471. The statute under construction is not an exemption statute, but is a commutation of taxes, and should be liberally construed.—37 Cyc. 892, et seq.; 121 N. Y. 542.

DE GRAFFENRIED, J.—In the case of *Dauphine & La Fayette Street Railway Co. v. Kennerly*, 74 Ala. 583, this court, speaking through BRICKELL, C. J., said: "It is an undoubted proposition that the burden of taxation, whether it be state or municipal, ought to fall equally upon all persons, natural or artificial, who may be subject to it. 'Taxation is the rule; exemption the exception.'—Cooley on Taxation, 146. When therefore it is claimed that by legislation any species of property, whether it be the property of natural persons, or of cor-

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porations created for individual profit, is relieved from its just proportion of public burdens, the intention to release it ought to be expressed in clear and unambiguous terms; it ought not to be deduced from language of doubtful import, nor when there is room for just controversy as to the legislative intent.—Cooley on Taxation, 146; Burroughs on Taxation, 132; *Stein v. Mobile*, 17 Ala. 234; *Delaware Railroad Tax*, 18 Wall. 207 [21 L. Ed. 888]; *Erie Railway Co. v. Pennsylvania*, 21 Wall. 492 [22 L. Ed. 595]; *Bailey v. Maguire*, 22 Wall. 215 [22 L. Ed. 850]. And it cannot be of importance in the application of this principle that the exemption claimed is not total and absolute—that it is partial and qualified, assuming the form of a commutation, or the substitution of a burden less onerous than that which is imposed on the property of others of like kind. An absolute, unqualified exemption, and a partial exemption, a commutation, differ in degree, not in character. A statute creating an exemption from taxation, or substituting, for the benefit of an individual or a corporation, taxation less onerous than that which others must bear ‘belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the Legislature.’—*Christ Church v. Philadelphia*, 24 How. 302 [16 L. Ed. 602].”

While the above rule was announced in a case which was narrower than the one now presented, the quoted language evolves a safe and sound doctrine which our courts can, in cases presenting questions similar to the one now under consideration, follow with safety. In the instant case domestic insurance companies are claiming a commutation of taxes which are accorded to no other class of corporations in this state. Domestic insurance companies are, by the express words of our statutes, accorded commutation of taxes which are not ac-

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corded other corporations, and this case is therefore brought directly within the reason of the language of Chief Justice BRICKELL which we have above quoted. If there is one sin to which the average citizen would not hesitate to plead guilty, it is the sin against his state of so assessing his property for taxation as to evade in so far as his conscience and the tax gatherers will permit the payment of that amount which the lawmakers intend to exact of him as an equivalent for the protection which is furnished him by the state. In this age of intense scholastic and logical discussion in which judicial precedents are being multiplied with unparalleled rapidity, some reason can be adduced for almost any apparently fair or candid interpretation of a statute. In some states a liberal interpretation of certain statutes is had, while in others a strict construction of the same class of statutes is the rule. The reasoning of the courts in *Camden & Amboy R. R. Co. v. Hillegas, et al.*, 18 N. J. Law, 11; *Louisiana R. R. & Nav. Co. v. Madere*, 124 La. 635, 50 South. 609; *Finney v. Mercer*, 1 Serg. & R. (Pa.) 62; *Bank v. Deming*, 29 N. C. 55; *State v. Jersey City*, 41 N. J. Law, 471; and *People v. Coleman*, 121 N. Y. 542, 25 N. E. 51—which are cited by counsel for appellee in their brief, announce no principle which can serve us in determining the question presented by this record.

In the case of *Louisiana Ry. & Nav. Co. v. Madere, supra*, the Supreme Court of Louisiana construed a statute which provided that "there shall be exempt from taxation for a period of ten years from the date of its completion, any railroad or part of railroad that shall have been constructed and completed subsequently to January 1st, 1905, and prior to January 1st, 1909," and declared that the general temporary exemption includes all ad valorem taxes, but not local assessments, such as

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acreage and produce taxes and the mileage tax levied on railroads. In that case the claim was made that, under the broad language of the quoted act, the railroads named in the act were exempt from all kinds of taxes, but the final pronouncement of the court was as we have above stated it to be. In the case of *People v. Coleman*, *supra*, a statute somewhat similar to the one considered by the Supreme Court of Louisiana in *Louisiana Ry. & Nav. Co. v. Madere*, *supra*, was construed, and the construction, based upon what the court ascertained, from the language of the statute and its purposes to be the true meaning of the Legislature, was in harmony with the conclusion which was reached in the above case by the Supreme Court of Louisiana.

The other cases which appear above as being taken from appellee's brief have been by us carefully examined, and they do no more than construe statutes which "exempt from taxation" the property of certain citizens—as soldiers of the line, etc., and in each instance the substance of the conclusion of the court was that the word "tax" is broad enough to cover state, county, and municipal taxes, and that the word would be so construed when the Legislature intended to use that word in its broad sense. In this state the rule is as we have above declared it to be, subject to the statement that when the court is called upon to construe a clause or provision in a revenue bill, as all of its sections and provisions became the law at the same time, the whole bill should be read, and each provision should be construed "as continuous sections of the same act, each in harmony with the others, so as to give effect to each without rendering nugatory any other if practical. The general rule, almost universal, in the interpretation of statutes in *pari materia*, is that the legislative intent, collected from all the statutes relating to the same subject, shall

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prevail over the letter, especially if, in giving the precise words their ordinary meaning, manifest injustice would ensue.—*State v. Stonewall Insurance Co.*, 89 Ala. 335, 7 South. 753.

In addition to this, it must be remembered that the presumption "against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience, or injustice."—Endlich on the Interpretation of Statutes, § 264.

Section 4 of the present Revenue Bill (Acts 1911, pp. 163, 164) provides that: "Domestic insurance companies shall pay only one dollar less said return premiums on each one hundred dollars of gross premiums so received by it in this state, and any such domestic insurance company *paying a tax on its property* or shares, may deduct the same from this tax."

We have italicized that part of the quoted provision which is of interest in this case, and in this connection we may as well, at this point, direct attention to the fact that in the above-quoted provision the Legislature was dealing with a privilege tax exacted by the state for the privilege of doing business in the state. Taxes are the equivalent paid the state for protection, and in the quoted clause the Legislature was dealing with that feature of taxation which pertains to the state. It was not then dealing with county or municipal taxes, but only with the amount which should be paid to the state by domestic insurance companies for the privilege of doing business in the state and of having the right to demand by reason of that privilege that protection be accorded to them under its laws. As domestic insurance companies are domiciled in the state and for that reason are likely, in addition to paying a license tax, to pay to the state ad valorem taxes on their property,

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the Legislature provided that a domestic company paying "a tax on its property or shares may deduct the same from this tax." As the state, in the quoted clause, was dealing with its privilege tax, and as, when the Legislature was considering this clause, it had in mind a state tax exacted for state protection and as a state privilege, by the use of the phrase "a tax on its property" the Legislature could hardly have had in mind a county tax or a city tax exacted by a county or city for furnishing its protection to such companies. The theory upon which counties and cities and towns are permitted to exact a toll, in the shape of taxes, from corporations and people owning property in such counties, cities and towns, is that such counties, cities, and towns furnish county, city, and town protection to the owners of such property. Their taxes are independent of the taxes laid for the state and the money arising through county, city, and town taxation is used for county, city, and town purposes, and not for state purposes. While counties, cities, and towns are, in their nature, political subdivisions of a state, nevertheless, for administrative purposes, they are usually treated as distinct entities. Certainly the Legislature, in laying this privilege tax for the state, had the power to credit such privilege tax with the ad valorem tax paid by domestic insurance companies to counties, cities, and towns; but as the privilege tax here under consideration is a state and not a county, city, or town exaction, and as the state, considered as a separate political entity, has no immediate interest in and directly receives no benefit from the ad valorem taxes paid counties, cities, and towns, it is difficult to presume that the Legislature, in adopting this clause of the Revenue Bill, could have intended, in laying this privilege tax for the state, to credit the claim of the state with something which had been paid not to the

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state for state protection, but to a county, city, or town for county, city, or town protection. In section 33-F of this Revenue Bill we find the following: "The courts of county commissioners or other courts of like jurisdiction, except in the cases otherwise provided, may at any regular or special term add to the license and franchise taxes herein levied, such amounts, not exceeding fifty per cent. of such taxes for county purposes, as, in its judgment, may be necessary and no license shall be issued without payment of such percentage for county purposes."

Section 33-F of the Revenue Bill, which confers upon counties the authority to levy certain privilege taxes, thus refers directly to section 4 of the same bill. The two sections, by the exact terms of said section 33-F must be read together, or to be more specific, the above-quoted clause from section 4 of the Revenue Bill must be read into section 33-F of said bill, and which section is an entirely new provision to our Revenue Law.

In addition to the above, section 4 of the Revenue Bill confers authority upon cities and towns in which a domestic insurance company does business to also lay a certain privilege tax upon such companies, and this provision must be read in connection with the clause which provides for the state premium tax. It may not also be inappropriate to call attention to the fact that the right of the state, of each of its counties in which a domestic insurance company owns tangible property, and of each town and city in which it owns such property to lay an ad valorem tax upon such property is recognized and provided for by our revenue laws. If then we were to adopt the argument of appellee as the basis upon which to rest our conclusions, we would convict the Legislature of the absurdity of providing a state privilege tax and then providing a commutation of such tax by the ad

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valorem taxes paid not only to the state, but to each county and each town or city in the state, and of making at the same time provision for certain privilege taxes for each county, city, and town in the state in which a domestic insurance company may do business without any commutation whatever. Nay, more; if we, as insisted by appellee, must stand upon the broad letter of the act and hold that "a tax" means, in the connection in which it is used, "any tax," then we should also hold, by the same process of reasoning, that the privilege tax provided for the state is also to be commuted by the privilege taxes paid to counties, towns, and cities. The word "tax" is broad enough to cover all taxes whether levied as ad valorem, or privilege taxes and the word "tax" when, by its context, it is shown to be so used, should be so construed. Counsel for appellee do not, of course, make this latter claim, but the fact that they do not indicate the force of the reasoning that what the Legislature intends by the use of a particular word or phrase is to be determined, not merely by the ordinary meaning of the word, but also by its context.

3. Appellee takes, as a handle for the argument that "a tax," as used in the above-quoted clause, means ad valorem taxes paid the state, the counties, and, as to that matter, the cities and towns of the state, the fact that section 4570 of the Code of 1907, which was superseded by the Revenue Bill of 1911, provided that any insurance company paying "to the state a tax on its property or shares may deduct the same from this tax." In other words, says appellee, the law, previous to the adoption of the present Revenue Bill, expressly limited the commutation under consideration to state taxes, and, as the express limitation fixed by the words "to the state" does not appear in the present Revenue Bill, it must be presumed that the Legislature must be held to

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have changed its policy and to have directed the commutation to be based upon all ad valorem taxes paid, not only to the state, but to its counties, towns, and cities. Our reply to this proposition is that in separate clauses in section 4 of the Revenue Bill provision was made for certain privilege taxes on domestic insurance companies for cities and towns, and that in section 33-F of the same bill a privilege tax on domestic insurance companies is also provided. In other words, the Legislature in passing the present Revenue Bill, in which provisions for counties, cities, and towns, as well the state, are made, had in mind the general subject of taxation, state, county, and city and town, and the whole act must be construed together. When a commutation of any particular tax by the amount of other taxes appears in the act, the word "taxes" fixing the commutation should be given that definition which is reasonable and just when the word is considered in connection with the particular subject to which it refers. If, in this act, the Legislature, after declaring that counties should have the power to lay a particular privilege tax had also provided "that any domestic insurance company paying a tax on its property or shares may deduct the same from this tax," we think it would hardly be contended that this commutation could by the courts be reasonably extended to the taxes paid the state, or to even a city or town in such county although the quoted language is broad enough to admit of such strained construction. The word "tax," in such instance, would have been referred to the character of taxes then under consideration, and the commutation meant would have been the ad valorem taxes paid the county by the insurance company claiming the commutation. Indeed, but for the change in the verbiage of the statute—if the Code provision had contained the exact words that are now in

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the Revenue Bill—we doubt if the present case would have found its way into the courts. The language, as it appears in the Revenue Bill, is broad enough to cover the claimed commutation, but when considered in connection with the subject of which it treats—premiums levied for the state—the words used are entitled, in all reason, to more confined definitions. “In the amendment, or revision or in the re-enactment of statutes, changes of phraseology, the omission of words deemed superfluous, or the addition of words rendering the intention more clear, are not infrequent. Before the courts can pronounce that the law is changed, the legislative intention to change it must be evident; language must be employed which is not susceptible of any other just construction.”—*Bradley v. State*, 69 Ala. 322; *Dudley v. Steele*, 71 Ala. 423; *Lindsay v. U. S. Savings & Loan Co., et al.*, 127 Ala. 366, 28 South. 717, 51 L. R. A. 393.

In our opinion, therefore, the trial court, upon the agreed statement of the facts, committed reversible error in rendering judgment against the appellant. The judgment of the court below should have been for the appellant, and the judgment of the trial court is reversed, and a judgment is here rendered in favor of the appellant.

Reversed and rendered.

ANDERSON, C. J., and McCLELLAN, SAYRE, and SOMERVILLE, JJ., concur.

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D. M. Ferry & Co. v. Hall.*Assumpsit.*

(Decided June 30, 1914. 66 South. 104.)

Sales; Construction; What Constitutes.—Where a seed company consigned seed to retail dealers under an agreement for the sale of the seed on commission with a return of the unsold seed when called for, to be taken back at the invoice price, and the amount due for the seed sold paid at that time, the transaction constituted a sale, the title passing to the dealers, and hence, defendant was not liable for the payment of taxes upon the seed; it further appearing that defendant did not fix the price of the seed, and the retailers were not required to account after each sale, but were only entitled to a deduction for the amount of the seed returned unsold.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Assumpsit by D. M. Ferry & Co. against Smith Hall, as Tax Collector, to recover taxes paid under protest. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

The following is Exhibit A:

D. M. Ferry & Co., Detroit, Mich.: Please forward in due season a number blank box of standard garden seed, flower seed and field seed, to sell on commission for the year 191—on the following terms, viz., 40% commission on the papers sold, and 25% on packages sold from the invoice prices; the unsold seed with the boxes to be returned in good order when called for, and the amount due for all seed not so returned to be paid for at same time.

On the reverse side was certain printing and blank not necessary to be here set out.

Exhibit B:

Memorandum of Shipment from D. M. Ferry & Co., Detroit, Mich., to John Doe, Dothan, Ala. In compli-

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ance with your order we have this day forwarded you care of ——— box ——— of our standard garden seed, an itemized retail invoice of which you will find on inside of box cover. If at any time you have not a sufficient supply of 5 cent papers, please order such as you may need, and we will promptly forward them by mail post paid.

Then follow certain directions as to freight charges, etc., and the added caution:

Please have goods removed from depot promptly on arrival and avoid storage charges.

Exhibit C:

No allowance for exchange. Error or shortage must be reported at once. D. M. Ferry & Co. give no warranty, express or implied, as to descriptions, surety, productiveness or any other matter on any seed they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are to be returned at once. We agree to buy back all unsold seed with boxes at prices billed, less discount, when our traveler calls.

This invoice and memorandum of shipment, together with the order marked Exhibit A, constitutes the original contract between D. M. Ferry & Co. and the original merchant. On the boxes shipped would be pasted the following paster, marked Exhibit D:

This case, including all papered seed and boxes invoiced on case cover are placed on commission, not sold outright.

D. M. Ferry & Co.

STANDISH BACKUS, and WEIL, STAKELY & VARDAMAN, for appellant. The title to the seed had vested in the retail merchants at the time of the delivery of the seed to the merchant, and hence, appellant was not liable for

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the taxes thereon.—35 Cyc. 41; and 290; *Jackson v. State*, 57 South. 110; 24 A. & E. Enc. of Law 1026; 2 Benj. on Sales, 794; 118 Fed. 471; 135 Fed. 868; 140 Fed. 572; *In re Heckathorn*, 144 Fed. 499; *Bradley Alderson & Co. v. McAfee*, 149 Fed. 254; *Coweta Fert. Co. v. Brown*, 163 Fed. 162; *In re Allen*, 183 Fed. 172; *Snelling v. Arbuckle Bros.*, 104 Ga. 362; *Chickering v. Bastress*, 130 Ill. 206; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427; *David Bradley Mfg. Co. v. Rayum*, 70 Ill. App. 639; *Independent Brewing Association v. Cook Brewing Co.*, 169 Ill. 347; *Aspinwall Mfg. Co. v. Johnson*, 97 Mich. 531; *People v. Newman*, 99 Mich. 148, 57 N. F. 1073; *DeKruiff v. Fleiman*, 130 Mich. 12; *Braun v. Keally*, 145 Pa. St. 519; *Bicking v. Stevens*, 69 Mo. Apps. 168; *Buffun v. Descher*, 96 N. W. 352 (Neb.); *Baker v. Turner*, 46 N. Y. Supp. 25; 19 App. Div. 223; *People v. Cannon*, 139 N. Y. 32 Am. St. Reports 668; *Conn v. Chamber*, 107 N. Y. Supp. 976, 123 App. Div. 298. Some of the essential elements of an agency and some of the essential elements of a bailment are lacking.—*Snelling v. Arbuckle Bros.*, 104 Ga. 362; *In re Carpenter*, 125 Fed. 831; *In re Rabenau*, 118 Fed. 471, supra; *In re Wells*, 140 Fed. 752 supra; *Bradley Anderson & Co. v. McAfee*, 149 Fed. 254; 35 Cyc. p. 28, § 4; *Norwegian Plough Co. v. Clark*, 102 Iowa 31; *Arbuckle Bros. v. Gates*, 95 Va. 802. The contracts under consideration are not conditional contracts of sale but are that class of sales contracts ordinarily termed “sale or return.”—*In re Landis*, 151 Fed. 896; *In re Allen*, 183 Fed. 172; *Allen Bethune & Co. v. Maury & Co.*, 66 Ala. 10; *Robinson v. Fairbanks*, 81 Ala. 132; *Foley v. Felrath*, 98 Ala. 176; *Town of Cottonwood, et al. v. Austin*, 158 Ala. 117; *Hotchkiss v. Higgins*, 52 Conn. 205; *Welsh v. McNerny*, 74 Conn. 675; *House v. Beak*, 141 Ill. 290; 33 Am. St. Rep. 307; *Warder, Mitchell & Co. v. Hoover*, 51 Iowa 491; *Walker*

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v. Blake, 37 Me. 373; *McKinney v. Bradlee*, 117 Mass. 321; *Moss v. Swett*, 3 Eng. & Law & Eq. Rep. 311; *In re Wells*, *supra*; *In re Miller v. Brown*, *supra*; *Peoria Mfg. Co. v. Lyons*, *supra*, 35 Cyc. p. 290, § 5.

ESPY & FARMER, for appellee. Under the facts in the case the title to the seed remained in appellant, and at the time of the assessment, the seed were the property of appellant and not that of the merchant.—*Thornton v. Cook*, 97 Ala. 632; *Fleet v. Hertz*, 94 Am. Rep. 192. As to whether goods were sold or consigned—whether a sale or a bailment—see 35 Cyc. 28 and 169. The seed were tangible, visible, personal property, and could have acquired a status for the purpose of taxation in this state.—*Trammell v. Connor*, 91 Ala. 399; *Boyd v. Selma*, 96 Ala. 154; *National D. Co. v. State*, 99 Ala. 463; 37 Cyc. 798, et seq.

GARDNER, J.—This cause was transferred to this court from the Court of Appeals under the provision of Acts of 1911, p. 449.

The appellant brought suit against the appellee for the recovery of \$203 paid by appellant to appellee, as tax collector for Houston county, under protest, suit having been brought by said tax collector for said sum due as taxes and garnishment issued in aid thereof.

The cause was submitted in the court below upon an agreed statement of facts, in which it was agreed that the facts in said cause were as set out in said agreement, and that the “cause be submitted to the jury upon said statement of facts, and that the liability, if any, of the defendant arises out of said facts.” The agreement further stipulates: “It is further agreed by and between the parties hereto that the only question presented for the court for its decision, in this case is whether or not

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the assessment for the collection of the taxes, due on said seed, should have been made against the said D. M. Ferry & Co., or against the merchants to whom said D. M. Ferry & Co. had shipped the seed, and in whose possession said seed were at the time the assessments were made, under the facts hereinafter set forth; and if the assessments for the collection of said taxes should have been made against said D. M. Ferry & Co., then the defendant is entitled to judgment; but if said assessments for the collection of said taxes should not have been made against D. M. Ferry & Co., then the plaintiff is entitled to recover."

The sole question, therefore, for determination is: In whom, for the purposes of taxation, vested the title or property to the seed in possession of the retail merchants? If the seeds were the property of the appellant, then it is conceded and agreed the defendant is entitled to judgment, and, on the other hand, it is likewise conceded and agreed that, if the seeds were the property of the retail merchants, then appellant is entitled to judgment.

The order of the retail merchant, the letter of acceptance accompanied by the invoice, and the placing of the paster marked in the record "D" on the box when shipped, together with the method or course of dealing with reference to said transactions between the wholesaler and the retailer, as disclosed by said agreed statement of facts, are the matters upon which, according to said agreement, we are to conclude the title to said seed.

The order has on it the word "consignment," and that which is signed by the retailer has the words "to sell on commission," showing the terms as 40 per cent. commission on the papers sold, and 25 per cent. on the packages sold, from the invoice prices; the unsold seed, with boxes, to be returned in good order when called for, and

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amount due for all seeds not so returned to be paid at the same time.

The invoice which accompanied the memorandum of shipment had thereon, among other things, the following: "Terms: To be settled for when traveler calls. Sold to Mr. John Doe, etc. We agree to buy back all unsold seeds with boxes at prices billed, less discounts, when our traveler calls."

The agreement shows that this memorandum of shipment and invoice, together with the order, constituted the original contract between appellant and the retail merchant, but that the boxes, when shipped, would have pasted on them the paster marked in record Exhibit D, and which appears in report of the case. The reporter will set out Exhibits A, B, C, and D, as found on pages 12, 13, 14, and 15 of the transcript, in his report of the case.

The following extract from the agreed statement of facts explains the method or course of dealing as between the wholesale and retail merchants, as to such transactions: "At the close of each season in which said seed was so sold, the traveling salesman representing D. M. Ferry & Co., would call upon the retail merchant and adjust the local dealer's account with D. M. Ferry & Co., taking back the unsold seeds in said box or boxes, allowing credit for the seed at invoice prices, and collecting cash for the balance of the seed at invoice prices, less the commission provided for in the original contract. The retailer, in selling the foregoing seed to his customers, would fix the price at which he would sell them, and would also have entire control of the seed, while the seed was in his possession and control, and would also sell the seed and collect for the seed from his customers in his own name. D. M. Ferry & Co. were in no way interested in the price which the retailer obtain-

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ed for the said seed, but merely took back the unsold seed, allowing credit therefor at invoice prices and collecting, for the seed not returned, the invoice prices, less commissions. The said seed were in packages and papers. D. M. Ferry & Co. printed a price upon said packages, but printed no price upon the papers; but, for the seed not returned by the retailer to D. M. Ferry & Co., the retailer accounted to D. M. Ferry & Co. for each package, not returned, at the price printed on said package, and at the price of five cents for each paper, less the commission.

"The retailer renders no account to D. M. Ferry & Co. of any sales made by him, and gives no information in regard thereto, but the representative of D. M. Ferry & Co. goes annually to each retailer, makes his own investigation from the seed that the retailer has on hand, and states the account between the retailer and D. M. Ferry & Co.

"There was no agreement between the retailer and D. M. Ferry & Co. that the seed would be sold at the prices named on the packages, nor as to the price at which the papers were to be sold; but the retailer was made to account to D. M. Ferry & Co. for all seed, not returned, at the prices printed on the packages and at five cents for the papers, which is invoice prices."

"Ordinarily where goods are consigned by one person to another for sale by the latter, the title thereto remains in the consignor; but whether the consignee is to be considered as a buyer or an agent depends upon the intention of the parties, and upon the real nature of the transaction rather than the language which the parties may have employed. So where the transaction is such that the consignee acquires complete dominion over the goods with the right to sell them upon such terms and conditions as he may see fit, and is bound to pay the

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consignor a stipulated price therefor, it amounts to a sale and delivery, and the title passes to the consignee, and such transfer of title is not affected by the fact that the goods are not to be paid for until resold by the consignee, or that he has an option of returning the goods which he has not resold."—35 Cyc. 290, 291.

Mr. Mechem in his work on Sales, in volume 1, § 46, has this to say: "The distinction between sale and an agency to sell is ordinarily clear and simple, but, unfortunately, many cases are presented in which the parties, for the purpose of evading the operation of some local statute, of defeating the claims of creditors, or otherwise, have made contracts involving such a confused jumble of the elements of both sale and agency that it is exceedingly difficult to determine their true character. Certain of these contracts have evidently been framed for the purpose of concealing a sale under the guise of an agency, while others have been drawn with a view to having them construed as contracts of sale or agency, as might best suit the convenience or subserve the purposes of their framers. In construing these anomalous instruments, courts look chiefly at the essential nature and perponderating features of the whole instrument, and not at the peculiar form of isolated parts of it. It matters very little what the parties have chosen to call their contract. * * * If the parties have made a contract which really operates to transfer the title, it is a sale, notwithstanding they may have labeled it a 'special selling factor appointment,' or have expressly stipulated that the alleged factor 'shall never purchase such goods for his own account.' So with regard to the use of the term 'consign.' It may express the true state of the case, and, if so, it will be given effect; or it may be a mere subterfuge, and, if it be the latter, 'there

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is no magic in that word which can take from the transaction its real character."

This is peculiarly illustrated by the *cases of Arbuckle Bros.*, whose contracts have been the subject of review in some of the courts of last resort, notably those of Georgia, Tennessee, and Virginia, wherein it was held that notwithstanding the contract was called, and purports on its face to be, a "special selling factor appointment," stipulates for a retention of title, and that the goods shall be consigned and held by the party, merely as a factor, and that such factor shall never purchase such goods on his own account, and the same to be sold in name of the factor, but only as the factor of Arbuckle Bros., and only at such prices and on such terms, as said Arbuckle Bros. may give from time to time. The contract provided also for certain "allowances and commissions." There were other provisions as to payments, etc., and these courts held that the entire contract disclosed a sale and not an agency, notwithstanding the many such expressions to be found therein.—*Arbuckle Bros. v. Gates & Brown*, 95 Va. 802, 30 S. E. 496; *Arbuckle Bros. v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Snelling v. Arbuckle Bros.*, 104 Ga. 362, 30 S. E. 863.

Speaking of this contract, the court in the latter case says: "It appears to have been drawn for the purpose of enabling Arbuckle Bros. to 'run with the hare or hold with the hounds,' according as, in the exigencies of a given case, their interest might dictate."

In reference to the same contract, the Supreme Court of Virginia, in above case of *Arbuckle Bros. v. Gates & Brown*, said: "The agreement was an attempt to accomplish that which cannot be done—to make a sale of personal property and at the same time constitute the buyer simply an agent of the seller to hold the property un-

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til it is paid for. The two things are incompatible and cannot co-exist. The agreement had in it every element of sale. It was in substance and effect a sale, and must be so declared. It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names and within they see the real nature of an agreement and determine from all its provisions, taken together, and not from the name that has been given it by the parties, or from some isolated provision, its legal character and effect."

The following excerpt from the case of *Buffum v. Descher*, 1 Neb. (Unof.) 736, 96 N. W. 352, is in point in this connection: "In all the cases it is held that the relation of the parties as principal and agent, or as vendor and vendee, is determined by the nature of the transaction, and not by the name which they give it, and the use of the words 'agent,' 'commissions,' etc., is of little significance. If the goods are delivered to the 'consignee' under such circumstances as to confer upon him absolute dominion over them, and he becomes bound to pay a stipulated price for them at a certain time or upon the happening of any future event, the transaction amounts to a sale and delivery, and the title passes to him."

The case often cited and referred to as a leading case among cases of this character is that of *Ex parte White*, L. R. Ch. 397. In stating the transaction between the parties, James, L. J., in his opinion says: "Mr. Nevill was to dispose of the goods sent to him by Toole & Co. and was not to pay for them unless he disposed of them, and he was to return, at the end of every month, an account of sales that he had actually made; and then, after the lapse of another month, he was to pay in cash for the amount of goods he had disposed of, according to

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their value as fixed by a price list sent to him. It does not appear that he ever was expected to return any particular contract, or the names of the persons with whom he had dealt. He pursued his own course in dealing with the goods, and frequently before sale had manipulated them to a very considerable extent by pressing, dyeing, and otherwise altering their character; * * * and he sold them on what terms he pleased as to price and length of credit."

The opinion then proceeds: "If he was entitled to alter them, to manipulate them, to sell them at any price that he thought fit after they had been so manipulated, and was still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he had sold them, or to anything else than the fact of his having sold them in a certain month, it seems to me impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of vendor and purchaser existed between *Toole & Co.* and the different persons to whom he sold the goods." (Italics ours.)

The opinion also says: "That it has been admitted in the course of the argument that there is no magic in the word 'agency.' It is often used in commercial matters when the relationship is that of vendor and purchaser."

It was held in that case that: "Mr. Nevill was in the position of a person having goods 'on sale or return.'"

In the same case from which we have just quoted, Mellish, L. J., said: "But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price at a fixed

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time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price that may be different and at a time that may be different from those fixed by the contract. * * * If A. hands over his goods to B., and B. is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B. then sells to C., the natural inference from these facts is, beyond all doubt, that there is a sale made to B. and another sale from B. to C., and all the circumstances confirm the view that such was the nature of the dealing here."

The following authorities also may be cited in addition to the above, to the effect that the mere use of the words "agent," or "consignment," or "commissions," etc., does not determine the character of the contract, but that it is the duty of the court to reach the *real intention* of the parties and declare the relationship.—*Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; *Jackson v. State*, 2 Ala. App. 226, 57 South. 110; *Peoria Mfg. Co. v. Lyons*, 153 Ill. 427, 38 N. E. 661; *Heryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160; *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; *In re Wells* (D. C.) 140 Fed. 752; *In re Carpenter* (D. C.) 125 Fed. 831; *Baker v. Turner*, 19 App. Div. 223, 46 N. Y. Supp. 25; *Bradley Alderson & Co. v. McAfee* (D. C.) 149 Fed. 254; *People v. Newman*, 99 Mich. 148, 57 N. W. 1073.

In this latter case it is said in the opinion that "calling profits 'commissions' does not change their character."

Mr. Mechem (volume 1, § 43) thus distinguishes a sale from agency to sell in these words: "The essence

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of sale is, as has been seen, the transfer of the title to the goods for a price paid or to be paid. Such a transfer puts the transferee, who has procured the goods to sell again, in the attitude of an owner selling his own goods, and makes him liable to the first seller as a debtor for the price and not, as an agent, for the *proceeds* (italics ours) of the resale. The essence of the agency to sell is the delivery of the goods to a person who is to sell them, *not as his own property but as the property of the principal* (italics ours), who remains the owner of the goods and who therefore has the right to control the sale, to recall the goods, and to demand and receive their *proceeds* when sold, less the agent's commission, but who has no right to a price for them before sale or unless sold by the agent."

While, in the instant case, a portion of the contract has the words "sell on commission" and the word "consignment" written thereon, yet other portion (memorandum of shipment and invoice, etc.) make use of the words "sold to" and agreement to "buy back," and nothing is said as to the title to the seeds or that the retail merchant is in fact the *agent* of the wholesaler, and, from what is therein contained, it is difficult to determine the real intention of the parties. The agreed statement of facts, however, contains the method of business, the course of dealing in reference to such transactions, and from such agreement it is disclosed that the retail merchant acquires complete dominion and control of the seeds, makes sales to *whom* he pleases at his *own prices* and on *whatever terms* he pleases, and makes no accounting whatever to the wholesaler. Indeed, from the agreed statement of facts it appears the retailer deals with the seed *as his own*. He need not sell at all, but may give away the seed or use them himself. He is to account to the wholesaler for the seed *not returned*

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at the invoice price, less the commission, when the traveling man calls and adjusts the accounts, giving the retailer credit for the unsold seed at invoice price. This settlement is *not* to be made as the seeds are sold, but the settlement is to be made when the "traveler calls"; that is, on demand, as it were. The retailer sold to his customer in his own name, and the wholesaler was in no manner interested in the price obtained, but merely took back the unsold seeds, allowing credit therefor at invoice prices. When sold by the retailer, the *proceeds* of the sale were *his* own, and no duty rested on him to account therefor to the wholesale dealer.

Under the agreed statement of facts as shown by the record, guided by the rules of law as found in the foregoing authorities, we think it quite clear that the retailer was not a mere agent but was in fact a purchaser of seeds. It is shown that the retailer had the right to return the unsold seeds, and that the wholesaler agreed to buy them back at invoice prices. What, then, is the relation between the parties?

In the case of *Allen, Bethune & Co. v. Maury & Co.*, 66 Ala. 10, it was said: "A sale may properly be defined to be, 'a transfer of the *absolute* or *general* property in a thing, for a price in money.' * * * If anything remains to be done by either party to the transaction, before delivery (as, for example, to determine the price, quantity, or identity of the thing sold), the title does not vest in the purchaser, but the contract is merely executory. * * * Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind, expressed within a reasonable time."

The case of *Robinson & Ledyard v. Fairbanks & Co.*, 81 Ala. 132, 1 South. 552, is somewhat in point in this

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connection, and in which the court said: "In our judgment the contract was not a bailment, or a 'sale on trial' or 'approval,' in which there is no sale until an approval is given, expressly or by implication. But it more nearly resembles a contract, or bargain of 'sale or return,' which vests the property in the goods, or so much of them as remained on hand at a fixed day in the future."

See, also, *Foley v. Felrath*, 98 Ala. 176, 13 South. 485, 39 Am. St. Rep. 39; *Town of Cottonwood v. Austin & Co.*, 158 Ala. 117, 48 South. 345. "In the case of sale or return, the property in the goods passes to the buyer at once, subject only to a defeasance by a return of the goods, unless it appears that the intention is that the title shall remain in the seller, as where payment of the price is made a condition precedent to the passing of the property. If the buyer fails to return the goods within the time limited or within a reasonable time, the sale becomes absolute."—35 Cyc. 290.

"A contract of this nature constitutes usually a present sale, subject to be defeated by a condition subsequent until return; therefore the title is in the vendee." Mechem on Sales, vol. 1, § 677.

"A contract 'on sale or return' is an agreement by which goods are delivered by a wholesale dealer to a retail dealer, to be paid for at a certain rate, if sold again by the latter, and, if not sold, to be returned."—Story on the Law of Sales, § 249.

Speaking to the same subject, the court in the case of *House v. Beak*, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307, says: "Such sales may be regarded as subject to a condition subsequent; that is, upon condition that, if the goods are not sold, they are to be returned. Therefore the property vests presently in the vendee, defeasible on the performance of the condition. If the

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defendant disables himself from performing the condition, or fails to perform it within a reasonable time, his liability to pay the price fixed becomes unconditional, and the plaintiff may declare as upon an indebitatus assumpsit. * * * The buyer may make himself liable to pay the price fixed in the agreement by refusing to return the property upon demand made for it by the seller, but, if the seller does not want the property and makes no demand for it, it is none the less true that the buyer will become liable to pay the price fixed, upon failing to return the property within a reasonable time."

We are of the opinion that the real transaction between D. M. Ferry & Co. and the retail merchants, under the agreed statements of facts, was that of "sale or return," as disclosed by these authorities and definitions. The retailer was to pay for the seeds not returned at a *certain price previously* fixed by the parties, and at a *certain time* (that is, when the "traveler calls"), and he had the option of returning seeds not sold. We deem a further discussion unnecessary, and indeed recognize that this opinion is doubtless of undue length, but we trust pardonable on account of the importance of the principles involved.

We have examined the cases relied upon by counsel for appellee (*Fleet v. Hertz*, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192; *Thornton v. Cook*, 97 Ala. 632, 12 South. 403), but the contracts there were not of a similar character, nor was there such a state of facts as that disclosed here, and are in no wise in conflict with the conclusion here reached. We therefore conclude that the transactions disclosed by this record, as appears from the agreed statement of facts, are not consignments, creating the relation of principal and agent, but are what are known as "sale or return," and that therefore the property vested in the retailer upon de-

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livery, subject to be defeated by the condition subsequent. For the purpose of taxation, therefore, the seeds under the agreed statement of facts were the property of the retailer, and the appellant was not liable for such taxes.

The court below erred in giving the affirmative charge for the defendant and in refusing that asked by the plaintiff. The judgment of the circuit court is therefore reversed, and, as the cause was tried upon an agreed statement of facts, one will be here rendered in favor of the plaintiff, for the sum sued for.

Reversed and rendered.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ.,
concur.

Compton v. Jefferson County Savings Bank.

Assumpsit.

(Decided November 7, 1914. 66 South. 446.)

Appeal and Error; Orders Appealable; Statutes.—Where a case in the Law and Equity Court of Marengo County had not been set down for hearing on the pleadings alone, rulings on the pleadings were not reviewable on appeal taken under section 26, Local Acts 1909, p. 356.

APPEAL from Marengo Law and Equity Court.

Heard before Hon. EDWARD J. GILDER.

Assumpsit by the Jefferson County Savings Bank against J. H. Compton. From rulings on the pleadings adverse to defendant he appeals. Submitted on motion to dismiss the appeal which was granted.

E. E. TAYLOR, for appellant. Counsel discuss the rulings on the pleadings, with citation of authority to the

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proposition that the various rulings were erroneous and prejudicial, but in view of the opinion, it is not deemed necessary to here set them out.

WILLIAM CUNNINGHAME, for appellee. Judgments on pleadings generally are not reviewable.—2 Enc. P. & P. 113; *Eslava v. Jones*, 79 Ala. 287. The right of appeal is purely a privilege and not a vested right.—Authorities *supra*. The setting down was not on the pleadings alone, and there was no final judgment, and hence, it was not such a setting down within the purview of §§ 26 and 42, Acts 1909, p. 339, as to support an appeal under § 28 thereof.—*Boone v. Riley*, 54 South. 997; *Kelly v. Griffin*, 165 Ala. 309. The appeal should, therefore, be dismissed.

McCLELLAN, J.—By section 26 of the act approved August 26, 1909 (Acts Sp. Sess. 1909, pp. 339, 356), to create and establish the Marengo law and equity court it is provided:

“That in all civil cases at law in the said Marengo law and equity court, the judge thereof may set down any case for hearing on the pleadings alone, and render judgment thereon in term time or during vacation, and from such judgment or ruling on the pleadings an appeal shall lie to the Supreme Court, to be taken within thirty days after such judgment or ruling is rendered or made; but nothing herein contained shall prevent such judgment from being assigned as error upon an appeal taken to said court after the final determination of said case, if an appeal shall not have been taken under this section.”

Section 42, p. 362, contemplates that civil and other causes enumerated in the section shall be set down, by the court, for hearing and for the settling of the pleadings.

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According to the letter of section 26, set forth above, it is a condition precedent to the right to appeal before final judgment in a civil case that the judge of the court set the case "for hearing on the pleadings alone."

The appellee moves this court to dismiss the present appeal, which is from rulings on pleadings only, because the presence of the just stated condition precedent is not shown by the record here. It does not appear from the record that the case had been set down by the judge for hearing on the pleadings alone, and that upon the hearing so ordered the rulings noted and urged for error were then made. The motion is well taken. Manifestly it was not intended by the act that from every adverse ruling on the pleadings, in the ordinary course of trials of civil cases that had not been set down for hearing on the pleadings alone, there might be an appeal to this court. It is not to be for one moment conceded that the lawmakers intended to write into law such a mockery of the administration of justice in the county of Marengo.

The motion to dismiss is sustained, and the appeal is dismissed.

Appeal dismissed.

Long v. Gwin.

Assumpsit.

(Decided June 30, 1914. 66 South. 88.)

1. *Appeal and Error; Right to Allege.*—Where the action was in Code form against several makers of a note, the only defendant who defended cannot complain that the action was discontinued as to other defendants who were not served, as authorized by section 2502, Code 1907, nor that the service was not proper as to others against whom default judgment was rendered.

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2. *Dismissal and Non-Suit; Grounds.*—In an action against several alleged makers of a note, there was no discontinuance in taking a default judgment against those defendants who did not appear, and in proceeding to trial against the others.

3. *Judgment; Default; Correction.*—Any error in rendering a default judgment against defendant who had not been properly served, may be corrected in the trial court on motion, or in the Supreme Court without remanding the cause if the judgment can be otherwise affirmed, at the cost of appellant.

4. *Same; Final.*—A judgment by default against defendants who do not appear is in its nature interlocutory to await disposition as to the other defendant, and is made final when judgment is rendered against the other defendants.

5. *Bills and Notes; Liability as Endorser; Presumption.*—Where the note itself bore defendant's signature on its back it showed prima facie that defendant was liable only as endorser, and in an action against such one as the maker of the note, plaintiff could not recover unless this prima facie presumption was rebutted, or unless proper notice of dishonor had been given.

6. *Same; Evidence; Parol.*—Where prima facie the note showed that one of defendants was liable only as an endorser, plaintiff could show by parol that although defendant's name was signed on the back of the note, he was in fact, liable as a maker and signed the note as such, and not as an endorser, and defendant was entitled to show if he could, that he was not liable as a maker, but was liable only as an endorser, if at all; parol evidence in such case not varying the written contract, but explaining the real contract, and the intention of the parties.

7. *Same; Liability of Endorser; Condition Precedent.*—An endorser's contract is conditioned on due presentment for payment to the party primarily liable, the maker or acceptor, and notice of dishonor; a failure to make such presentment or give such notice discharges the endorser.

8. *Same; Presentment; Maker.*—A maker of a note being primarily liable is not entitled to presentment or to notice of dishonor.

9. *Same; Endorsement; Irregular.*—Where a party writes his name on the back of a note as endorser, at its inception, and not after it was fully executed, it is an irregular endorsement.

10. *Same.*—The payee of a note is usually the first endorser, and liable next after the maker or acceptor.

11. *Same; Liability of Endorser; Jury Question.*—Under the evidence in this case it was for the jury to say in what capacity defendant signed, whether as maker or endorser.

APPEAL from Bessemer City Court.

Heard before Hon. JAMES TROTTER, Special Judge.

Action by M. M. Gwin against R. H. Long and others, upon a bill single or promissory note. Judgment for

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plaintiff, and defendants appeal. Reversed and remanded.

The seventh plea of defendant Long is as follows:

Plaintiff should not recover in this case against this defendant for that the instrument sued on was a negotiable instrument, and this defendant was, if liable at all, only liable as an indorser, and that said instrument was dishonored by nonpayment at maturity, and that notice of such dishonor was not given this defendant when said instrument was so dishonored, nor within the time required by law for such notice; therefore this defendant is discharged from liability on said instrument.

ESTES, JONES & WELCH, and WILLIAM MILLIKEN, for appellant. Having proceeded to judgment by default against a part of defendants there was a discontinuance as to defendant Long.—23 Cyc. 736; 6 Enc. P. & P. 20; *Brooks v. Maltbie*, 4 S. & P. 96; *Dearing, et al. v. Smith, et al.*, 4 Ala. 432; 9 Ia. 355; 8 Tex. 131. Plea 3 was a good plea, and not subject to the demurrers interposed.—1 Brick. 394; 3 Brick. 152; 9 Cyc. 321. The same is true of pleas 4 and 10. Plea 11 was a good plea.—*Richardson v. Fields*, 124 Ala. 535. It was competent to show how defendant signed the note, but it was not competent for plaintiff to introduce evidence as to whether Long was a maker or an endorser, as they cannot be jointly sued.—*Scarborough v. City Nat. Bank*, 157 Ala. 577. The complaint declared on a bill single, and the paper offered in evidence was a plain promissory note. This constituted a variance.—*Davis v. McWhorter*, 122 Ala. 571. Counsel discuss other matters complained of, but cite no additional authority.

PINKNEY SCOTT, for appellee. There was no discontinuance.—§§ 2502 and 5384, Code 1907. There was no variance.—*Davis v. McWhorter*, 122 Ala. 672. It did

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not matter where defendant signed the note, whether as maker, in front or on the back.—*Eudora Co. v. Barclay*, 122 Ala. 506; *Carter v. Long*, 125 Ala. 280. The following authorities answer all the other arguments advanced by appellant.—*Bomar v. Rosser*, 131 Ala. 215; *Dexter v. Ohlander*, 93 Ala. 441.

MAYFIELD, J.—Appellee sued appellant and a number of others on a written instrument, in form a promissory note, but in the complaint denominated a “bill single.” With this exception the complaint is in Code form, for an action by the payee against the several makers of a promissory note.

Several of the defendants, alleged makers, were not served, and as to these the plaintiff discontinued, as is authorized by section 2502 of the Code. As to this there was no error nor injury of which this appellant can complain. The other defendants served, than Long, failed to appear and defend, and judgment by default was entered against them; and the case proceeded to trial as against defendant Long. It appears that some of these defendants, against whom judgment by default was rendered, had not been properly served, but as to this there was no reversible error nor error of which Long could complain.

This error can be corrected in the trial court on motion, or in this court, without remanding the cause, if the judgment can be otherwise affirmed, at the cost of the appellant.—*Neff v. Edwards*, 81 Ala. 246, 2 South. 88.

There was no discontinuance of this cause by the taking of judgment by default against those who did not appear, and proceeding to trial as against the others.

In such case the judgment by default is, in its nature, interlocutory, to await disposition of the case as

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to the other defendants; and in this case it was made final when judgment was rendered against the other defendants.—*Brooks v. Maltbie*, 4 Stew. & P. 96; *Mobile Co. v. Smith*, 51 Ala. 329; *Neff v. Edwards*, *supra*.

The defendant Long interposed several pleas, including that of non est factum; and demurrer was sustained as to all except the plea of non est factum.

Plea 7 presented a good defense to the instrument; that is, if the facts alleged in the plea were true, the defendant Long was not liable, though he had signed the instrument sued on.

The action is by the payee against the makers of a note. The complaint did not show that plaintiff was a bona fide purchaser or holder of the instrument. The complaint shows an action only between the original parties to the contract sued on, and hence the defenses set up were availing to the defendant.

While the defendant is sued as a maker, the instrument on its face prima facie shows that the defendant is liable only as an *indorser*. Unless this prima facie presumption is rebutted, which may be done in this action, the plaintiff cannot recover.

The plaintiff in this action had the right to show that, although Long's name was signed on the back of the note, yet he was in fact liable as a maker, and signed the note as such and not as an indorser. On the other hand, the defendant had the right to show that he was not liable as maker, but liable, if at all, only as indorser.

It is made to appear in the case beyond dispute that defendant Long's signature to the note was on its back; and therefore he was prima facie indorser and not maker; yet it is also conclusively shown that he signed before the note was delivered, and that the note had never been indorsed by the payee; that he still holds it and sues on it as the original payee; and that Long signed

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the note at its inception to give it credit. The rule is thus stated in Randolph on Commercial Paper, vol. 2, §§ 833, 841:

"Sec. 833. In distinction from cases that hold such indorsement to be conclusively a joint making are those which hold it to be such *presumptively*. And this has been held to be the case *prima facie*, although the indorsement was expressly 'without demand and notice.' While such is the presumptive contract, parol evidence of a different intention is admissible between the immediate parties to the contract, but not against a bona fide holder of the note for value before maturity. And it has been held that his intention to contract as maker may be shown by parol in an action brought by him against the payee as a prior indorser, although the payee indorsed first. On the other hand, it has been held that parol evidence is requisite in order to render such an indorser liable either as maker or guarantor. And to hold him as maker, not only such an intention must be proved, but also the fact that his indorsement was at the inception of the note, and that he was privy to the original consideration. But an averment that he indorsed the note before its delivery to induce the payee to take it is sufficient, although, if such averment had been denied by the plea he might have been shown to be a guarantor. According to his intention, he has been held to be a maker or surety, a maker or indorser, a maker or guarantor, a maker, guarantor, or indorser. And, irrespective of presumptions, the meaning of such indorsement obviously becomes a question of intention, to be determined by the evidence in the case, although this statement is sometimes restricted to actions between the original parties and in the absence of indorsement by the payee, while, if such indorsement appears above that of the payee, it is said to

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have been made presumptively to obtain credit with the payee and to belong, as such, *prima facie* to the original contract, sharing in the original consideration."

"Sec. 841. * * * Parol evidence, where it is admissible, may show that such indorser is liable to the payee. So that the indorsement was made at the date of the note and intended as an original promise, and that the payee afterwards indorsed the note above such signature; or, on the other hand, that it was not contemporaneous with the note, and therefore not a joint promise, or was indorsed at the maturity of the note as a guaranty. Moreover, such indorser may show, at the suit of the original payee, that he had expressly refused to sign as joint maker, or that he had signed with the payee's name blank under a special agreement, and that a diversion of the paper had been made contrary to the agreement, or that he had signed merely as a witness for the payee."

It follows, therefore, that the trial court erred in sustaining demurrers to special plea 7 and in declining to allow defendant to introduce proof tending to show that he had signed the note as an indorser and not as maker. Strange to say, the court allowed plaintiff to testify that the defendant told him he signed the note as maker but would not let the defendant show that he signed it as indorser and not as maker. The note purported to be signed by the defendant Long as indorser and not as maker; and the defendant's proposed evidence did not even tend to contradict the writing as did that of the plaintiff, which was received, but as we have shown above, this was only *prima facie*, and not conclusive.

Either party to the contract may show in what capacity the note was signed; that is, as maker, surety, indorser, guarantor, etc. This is one of the well-recognized exceptions to the general rule that parol evidence is

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not admissible to vary a written contract. It does not, in such cases, vary the written contract, but explains it, and shows what the real contract and intention of the parties was.

“The indorsement as written, although a necessary part of the contract, is not the whole of it. The entire contract is the writing as understood, delivered, and received, and is to be gathered from the language, usage, course of business, and relation of the parties. The rights of the immediate indorsee are affected by the actual contract with his indorser, but subsequent purchasers without notice are entitled to look to the indorsement for all that it appears to be on the paper. Parol evidence of the actual contract has on this ground been held to be admissible between the immediate parties or against subsequent holders with notice. And on the theory that a blank indorsement is a contract only so far expressed in writing as to raise a presumption of a certain undertaking, which is not conclusive except in favor of subsequent bona fide holders for value, parol evidence is admitted to explain the true contract between the original and immediate parties. And this is unquestionably true of the blank indorsement of a non-negotiable bill or note. Indorsements at the making of a note, and before that of the payee, made by one who is not otherwise a party to the note, are to be distinguished from ordinary commercial indorsements, and are considered by themselves in a later chapter. In Georgia it is expressly provided by statute that all blank indorsements may be explained by parol evidence as against immediate parties and parties with notice. On the other hand, most authorities hold that the implications and intendments which the law merchant has attached to blank indorsements of negotiable commercial paper render them express and complete contracts,

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which cannot be explained or varied by parol. This rule, as we shall see, has many exceptions. It has been applied even to an indorsement in blank made after maturity. Under it such evidence has been held to be inadmissible, even against an immediate indorsee, to contradict the indorsement by showing that the indorser was not liable. But an indorser may show, in an action by his immediate indorsee, an agreement on his part to sue the acceptor only, and not to look to the indorser."—Randolph on Com. Paper. vol. 2, § 778.

The other pleas as to which demurrers were overruled were either bad, or subject to demurrer, or were fully covered by plea 7. It should be remembered that the liability of a maker is entirely different from that of an indorser. The contract expressed and that implied are different. Defenses are availing to one, which are not to the other.

The indorser's contract is conditioned on due presentment for payment to the party or parties primarily liable, the maker or acceptor, and the notice of dishonor, and a failure to make such presentment or to give such notice will discharge the indorser; but of course the maker of the note, who is primarily liable, is not entitled to presentment or to notice. Of course the indorser may waive the presentment and notice, but that question is not now in this case. Also, if the holder releases the maker or acceptor, this will effect the discharge of all subsequent parties, such as indorsers, unless the right against them is expressly reserved.

There are, of course, irregular indorsements, such as appear in this case, if the parties who wrote their names on the back of this note were indorsers and not makers. It appears that they so signed the note at its inception, and not after it was fully executed, as is the case of ordinary indorsements of notes.

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The payee is usually the first indorser, and is liable next after the maker or acceptor; but here it is undisputed that the payee has never indorsed, or parted with the title to, the note, though the names of several parties, including the defendant Long's appear on the note prima facie as indorsers and not as makers. As we have said, in such cases parol proof is admissible to show in what capacity the persons signing such notes acted; that is, as makers or indorsers. This is certainly true in actions like this, between the original parties, to the contract. Such evidence tends to explain, and not to contradict, the writing.

The note here sued on was declared on as against the makers only; on its face it appeared that some of the defendants signed as indorsers and not as makers, and, if such was the fact, of course there was a material variance between the allegations and the proof; but parol proof was admissible to show that they signed as makers, and to thus prevent a variance, and the note would then be admissible in evidence, and it would then be a question of fact for the jury to say in what capacity they signed.

What we have said will be a sufficient guide on the next trial.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

[Walker v. Gunnels.]

Walker v. Gunnels.*Assumpsit.*

(Decided June 30, 1914. Rehearing denied July 25, 1914.
66 South. 45.)

1. *Appeal and Error; Review; Theory of Case.*—Where the case is tried in the lower court on one theory, it will be treated on appeal upon that theory.

2. *Same; Harmless Error; Conduct of Attorney.*—Where the answer elicited nothing capable of exerting a prejudicial influence upon the jury, insinuation of counsel in a question to defendant that the excuse of defendant for a repeated failure to go with plaintiff's agent to estimate the value of the improvements, was a mere pretense, was harmless.

3. *Landlord and Tenant; Holding Over; Rent.*—Where a tenant holds over with the consent of his landlord, he is liable for the same rent reserved in the lease for the preceding year, not for a reasonable rent, and an ineffectual intervening negotiation for a sale makes no change.

4. *Same; Recoupment; Improvements.*—Where the tenant sought to recoup for improvements, evidence for the tenant that the ditching he did was reasonably worth \$25, but not showing that that amount was reasonable, was not admissible.

5. *Same.*—The fact that the tenant had placed thirty loads of stable fertilizer on the land in the ordinary course of cultivation, was not an improvement for which he could claim a set off.

(Sayre, J., dissents in part.)

APPEAL from Anniston City Court.

Heard before Hon. THOMAS W. COLEMAN, JR.

Assumpsit by Mrs. Susan E. Gunnels against T. K. Walker. Judgment for plaintiff, and defendant appeals. Affirmed.

The third assignment of error is:

The court erred in sustaining appellee's objection to appellant's counsel asking him how much he paid for the ditching.

The following is charge 1 given for plaintiff:

The court charges the jury that defendant is not entitled to recoup or set off any amount in this case for

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his own services in superintending the work that was done on the land of defendant.

S. W. TATE, for appellant. Where nothing was said about the rent, it was left to the real value, and what had been formerly paid could not be a criterion. Counsel discuss the other matters insisted on, but without citation of authority.

KNOX, ACKER, DIXON & STERNE, for appellee. Where a tenant holds over with the consent of the landlord, he becomes liable for the same rent and upon the same terms as specified in the original lease.—*Rhodes F. Co. v. Weedon & Dent*, 108 Ala. 252; *Robinson v. Holt*, 90 Ala. 115; *Woolf v. Woolf*, 69 Ala. 549. The price paid for an article is not the criterion of its value, and the witness should have shown what the ditching done was reasonably worth. The ditching and the spreading of fertilizer was not a permanent improvement.—22 Cyc. 5 Counsel discuss other matters, but without citation of authority.

SAYRE, J.—Common assumpsit by appellee against appellant for the rent of land during the year 1912. It appeared without dispute that defendant had rented the same land for the year 1911 at a rental of \$200, and had held over with an understanding that he was to purchase, but, some question arising as to plaintiff's ability to make title, the proposed purchase was abandoned by mutual consent, and defendant remained in possession as plaintiff's tenant without, as defendant contended, any agreement as to what the rent for the current year should be. In this state of the case it was competent for plaintiff to prove what rent defendant had paid for 1911, on the well-settled rule of law that a tenant who holds over, with the express or implied consent of

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his landlord, is liable for the same rate of rent as that reserved in the lease for the year before.—*Ames v. Schuesler*, 14 Ala. 600; *Rhodes Furniture Co. v. Weed-en*, 108 Ala. 257. In the application of this principle to the case under consideration the intervening abortive negotiation for a sale made no change.—*Chamberlain v. Godfrey*, 50 Ala. 530.

Defendant did not deny that he had agreed to pay \$200 as rent for the year 1911. He did deny any express statement as to the rent for 1912. His theory of the case seems to have been that he was liable for a reasonable rental only, and that in estimating such rental the chance of the seasons, the unprofitable results of his husbandry, and the fact that in 1910 plaintiff had rented the land to one Humphrey for a sum less than he (defendant) had paid in 1911, were circumstances that should be taken into consideration. In this defendant was in error. On the facts stated, and in the absence of a new agreement as to the amount of the rent to be paid, the law fixed his liability.—*Ames v. Schuesler*, *supra*; *Crommelin v. Thiess*, 31 Ala. 412, 70 Am. Dec. 499. This was the theory upon which the case was tried, and this will suffice to explain and justify several of the rulings assigned for error.

Under his pleas of set-off and recoupment defendant adduced evidence tending to show that plaintiff had agreed, upon the failure of the negotiation for a sale, to pay him for improvements he had put upon the land. At one point defendant testified that plaintiff agreed to make an allowance to him for work done upon the place as a credit upon the rent. It cannot be supposed that plaintiff assumed to pay defendant for work the latter had already done or might thereafter do in the way of raising a crop for his own benefit. The only reasonable interpretation of the agreement in this regard is that

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plaintiff promised to pay defendant or allow him a credit for improvements he had made in anticipation of a purchase, and which contributed to the permanent value of the land. This, indeed, was, in substance, the interpretation the parties placed upon the agreement when they arranged for a joint visit to the premises for the purpose of estimating the value of what defendant had done.

The writer being disposed to sustain the third assignment of error, the court holds otherwise, and expresses its judgment in the following language, per McCLELLAN, J.: "The defendant testified: 'The ditching that I did on the place was reasonably worth \$25.' The succeeding recital of the bill is this: 'The defendant's counsel here asked him how much he had paid for the ditching.' Objection was sustained to this question; to which exception was reserved.

"Where the subject of inquiry as to value is not, as here, a thing having a market value susceptible of proof, evidence of the cost or price paid therefor is admissible upon the issue of value; provided the evidence of cost or price paid is shown to be reasonable.—*Sou. Ry. Co. v. Reeder*, 152 Ala. 227, 44 South. 699, 126 Am. St. Rep. 23. Where the competency of evidence depends upon some other or additional fact or matter, the court will not be in error in refusing to allow the evidence presented unless the other or additional fact or matter has already been shown, or there is an offer by the party proposing to introduce such conditionally admissible evidence, at the time it is offered, to show the fact or matter which would meet the condition.—*Wiswall v. Ross*, 4 Port. 321, 330; *Shields v. Henry*, 31 Ala. 53; *McGehee v. Mahone*, 37 Ala. 258, 264.

"In order to render testimony of the amount paid by defendant for the ditching in question admissible, it

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was a condition precedent that he show, or offer to show that the sum paid was reasonable. This he did not do. The avowal that the ditching was reasonably worth the sum stated by him was not, as appears, the affirmation that the sum paid therefor by him was reasonable. The court did not err in disallowing the question indicated."

There was no error in excluding the defendant's evidence to the effect that he had placed 30 loads of stable manure on the land. This, so far as we can see, was in the ordinary course of cultivation, and did not constitute an improvement within the fair interpretation of the agreement between the parties.

The question put by plaintiff to defendant on cross-examination and made the basis of the seventh assignment of error was a mere argument, and carried the insinuation that defendant's excuse for failing time after time to go with Dr. Ligon, plaintiff's agent, to estimate the value of the improvements he claimed to have put upon the place, was a mere pretense. But it cannot be assumed that the attorney's innuendo worked harm to the defense. No doubt, the jury estimated it at its true worth. In the answer elicited nothing has been found capable of exerting a prejudicial influence upon the jury, and the assignment of error predicated on the allowance of the question must be held for naught.

Our interpretation of the agreement made between the parties, at the time the negotiation for a sale was dropped, for the compensation of defendant for work or improvements upon the place, leads to the conclusion that there was no error in giving of the charge No. I on plaintiff's request.

The discussion need not be prolonged. What we have said covers in principle all the errors alleged by appellant.

[Betty v. The State.]

No reversible error is found, and the judgment will be affirmed.

Affirmed. All the Justices concur, except as above stated.

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Assumpsit.

(Decided November 7, 1914. 67 South. 457.)

1. *Militia; Constitutional Provisions.*—It is competent for the legislature to prescribe the services to be rendered by the state militia.

2. *Same; Pay for Service.*—Section 278, Constitution 1901, sections 7396, 1399-7402, Code 1907, and Acts 1911, p. 670, considered, and it is held that an aide de camp on the Governor's staff had no duties apart from active service, under the Commander-in-Chief, and that travel by the aide when ordered to accompany the governor to the inauguration at Washington, was not compulsory, or in active service, and hence, that he was not entitled to any pay or allowance therefor.

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

Assumpsit by the State against Lewis S. Betty. Judgment for plaintiff, and defendant appeals. Affirmed.

The suit is for the sum of \$82 paid to defendant as alleged without authority of law. The facts agreed upon are as follows: Defendant is and was a regularly appointed and acting member of the staff of the Governor of Alabama, being an aid-de-camp with the military rank of Lieutenant Colonel. On February 24, 1913, by direction of the Governor, a general order was issued in terms as follows:

(1) The Governor and his staff will attend the inauguration of President Wilson at Washington, March 4, 1913. (2) Uniform worn will be full dress. Mounts will be furnished with saddles, bridles, and saddlecloths

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at the stable of J. M. Peaks, 643 New York avenue, N. W., Washington, D. C. (3) Members of the staff are requested to report to the Governor at the Warner House, Washington, not later than the night of March 3d. The travel enjoined is necessary in the military service. By command of the Governor. [Signed by the Adjutant General.]

In response to this order, Col. Betty and the other members of the staff went to Washington and officially took part, along with the Governor, in the ceremonies attending the inauguration. Col. Betty's incidental expense account, duly verified, was approved by the Governor and ordered paid. Thereupon a warrant was issued by the auditor, and in due course paid by the treasurer. On these facts, the trial court rendered judgment for the state.

DANIEL W. TROY, for appellant. The service was active service, and having been ordered by the Governor, the necessity of the service was conclusive.—21 Wis. 621; 66 Am. Dec. 356; 15 L. R. A. 116; 6 L. Ed. 537; Acts 1911, p. 651.

R. C. BRICKELL, Attorney General, for the State. The act relied on does not authorize an expenditure of military funds for journeys beyond the borders of the state, nor could there be any military service in connection with the trip taken out of the borders of the state and to an inauguration.—§ 278, Constitution 1901; §§ 7396, 7399-7402, Code 1907; Acts 1911, p. 670.

SOMERVILLE, J.—Section 278 of the Constitution provides that: "The officers and men of the militia and volunteer forces shall not be entitled to or receive any pay, rations, or emoluments when not in active service."

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It is competent for the Legislature to prescribe the services to be rendered by the state militia, and it is clear that the constitutional inhibition above quoted is designed to prevent the allowance of pay, or incidental perquisites, except for those actual and specific military services which are prescribed by law; and except for those periods of time when the militia, as a whole, or any of its units or parts, is actively engaged in public military service.

Our statutes prescribe two modes of "active service": (1) The militia may be called out by the Governor "to execute the laws, suppress insurrection, and repel invasion."—Code, § 7396. And, in certain exigencies of riot and disorder, certain civil officer may command the local service of the militia.—Code, §§ 7399—7402. (2) The militia may be annually ordered by the Governor to assemble in arms for the purpose of training them in the arts and discipline of military service in the field. Sections 50-53, Act of April 22, 1911; Sess. Acts 1911, p. 670.

We conceive that a Governor's militia staff can be in "active service" only in connection with the active service of the militia serving in some mode prescribed by law, since the law enjoins upon the staff no separate and independent service "as a staff."

The defendant's theory is that, as a member of the Governor's staff, he is bound under penalty to obey the orders of his commander in chief; and hence that his official attendance upon the Governor at the Washington inaugural was a legally authorized function, and constituted an "active service" within the meaning of the Constitution and laws. The defendant, in support of this theory, relies mainly upon certain provisions of the Militia Act of April 22, 1911, viz.: "Sec. 6. The several staff officers shall perform the same duties as

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nearly as the circumstances of the case will permit, as are performed by like staff officers in the United States army, and any and all such duties as may be required of them by the commander in chief."

"Sec. 43. Any officer or enlisted man traveling in obedience to the orders of the Governor shall be paid all actual expenses incurred in the performance of such duty. * * *"

Both of these provisions are, however, subject to very obvious qualifications. If the law has not imposed specific duties upon a governor's aid-de-camp, it is evident that he has and can have no duties apart from the active service of the militia forces, commanded by his chief. In a word, his chief acquires jurisdiction over him, with the right to command his actions, only with respect to and in connection with the active service, actual or contemplated, of his troops. Apart from such service, the militia staff officer is a civilian and not subject to military orders or control.

It is equally clear that section 43 contemplates the payment of actual expenses only in those cases where an officer or soldier has traveled under the Governor's orders, in the accomplishment of, or in relation to, some military purpose sanctioned by the statutes, or arising out of the exigencies of active militia service.

But, it is plausibly urged, the necessities of the military service demand unquestioning obedience on the part of a subordinate to the orders of his commander; and a subordinate who thus obeys, without the right to question, must be regarded quoad hoc as being in "active service." And, it is further insisted, the Governor, as commander in chief, having determined that the particular act or action is under the circumstances appropriate or necessary in the military service, his judgment to that effect is conclusive and binding on soldier and civilian alike.

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As we have heretofore stated, the general scope and the particular occasions of military service by the militia are fixed by law; and, although in the achievement of these authorized objects the Governor exercises the plenary powers of a commander in chief, we think it must be readily apparent that he cannot, by the mere device of a military order, create new forms and enter new fields of military activity. Such a power, capable of almost infinite abuse, would be incompatible with the spirit of our institutions. Not being expressly conferred by law, the power must be held as denied by necessary implication.

If the Governor can assemble and transport his staff to Washington, to take part in a presidential inaugural, as a military body in the service of and at the expense of the state, there is no reason apparent why he could not, thus accompanied, attend any official function, federal, state, or municipal, wherever it might be staged. And, if the magnitude of the occasion or the liberal fancy of the Governor should prompt it, he might carry with him a brigade. Such extravagant abuses are, of course, only remotely conceivable; but their consideration forcibly negatives any implication of the power of a Governor to indulge in them at the public expense.

It is eminently proper that a state should be officially represented at a national inaugural; but until the Legislature sees fit to delegate that service to the military, or to authorize the Governor to so use it, the discharge of such a function by members of that department, though ordered by the Governor, cannot be regarded as an active military service for the state in any legal sense.

Members of the state militia are not bound to obey palpably unlawful commands; and, in any event, they can claim or receive compensation or emoluments only

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when, in accordance with the prescriptions of law or of lawful superior orders, they are engaged in active service for the state.

It cannot be denied that, whenever military action and service are authorized by law on stated occasions at the call of the Governor, a determination by the Governor that such an occasion exists is conclusive of the question, so far as the duty of the militia and their compensation are concerned. In other words, the Governor authoritatively decides whether existing conditions create the occasion specified by the law for his action.—*Chapin v. Ferry*, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116, and cases cited in note; *Martin v. Mott*, 25 U. S. (12 Wheat.) 19, 6 L. Ed. 537. But it is clear that this rule of expedience and necessity does not authorize the Governor to create and declare occasions for military action on the ground merely that such action is necessary in the military service—a fallacious paraphrase of the principle as well as the policy of the rules quoted.

It would seem, however, on the soundest principles of reason and justice, that when any branch or any member of the state militia is called to arms and service within the boundaries of the state by the Governor as commander in chief, whether the order does or does not designate a purpose authorized by law, obedience by the soldier is compulsory. He cannot question either the necessity or the propriety of the call, and it follows necessarily that, from the beginning of mobilization to final discharge by the commander, the soldier is in the active service of the state, and entitled to pay or expenses as the law may provide.

It would seem, also, that when a soldier is ordered to do an act which has no relation to the accomplishment of a legitimate object—in short, an act which is outside the scope of legally required or authorized action by

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the militia or any of its members—and the illegal or unauthorized character of the action clearly appears upon the face of the order, then there is no duty to obey the order and no penalty for its disobedience. A militia man is not an automaton, and the duty to obey a superior officer is bounded by the jurisdiction and authority of the officer who commands him.

It is easy to see that many questions of delicacy and difficulty may arise in this connection, and we are not now attempting to offer a touchstone for their solution. The foregoing observations are designed to supply a basis of principle for the conclusions to which we feel impelled: That there is no authorized service by the state militia beyond the limits of the state; that the order under which defendant acted was in excess of the jurisdiction and authority of even the commander in chief; and that obedience to the order was voluntary and not compulsory.

It follows, necessarily, that the allowance of the defendant's expenses in this behalf was unauthorized, and their payment unlawful.

The judgment of recovery will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ.,
concur.

[Ogburn-Griffin Gro. Co. v. Orient Insurance Company.]

Ogburn-Griffin Gro. Co. v. Orient Insurance Company.

Assumpsit.

(Decided November 7, 1914. 66 South. 434.)

1. Insurance; Fire; Causes; Collapse of Building.—Where the fire insurance policy contained a clause that if the building shall fall, except as a result of fire, all insurance on the building and contents shall immediately cease, the owner of a stock of insured goods cannot recover thereon if the building fell from some other cause than fire, if none of the goods were injured by the fire before the collapse of the building, even though it caught fire before it fell.

2. Appeal and Error; Harmless Error; Instructions.—Where the jury returned a verdict for defendant, any error in instruction as to the measure of damages if the jury should find for plaintiff was harmless to plaintiff.

3. Same.—The fact that an instruction is misleading does not call for a reversal, as plaintiff's remedy is to ask for an instruction explanatory thereof.

4. Same.—The fact that an instruction is misleading does not call for a reversal, as plaintiff's remedy is to ask for an instruction explanatory thereof.

4. Same; Assignments; Briefing.—Where there were eighteen assignments of error, all relating to the charges, and the brief discussed twenty-six assignments, and as to all but the first three referred to charges not referred to in the assignment, and in some instances to charges not in the record, all the assignments except the first three will be treated as waived under rule 10, Supreme Court Practice.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Action by the Ogburn-Griffin Grocery Company against the Orient Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The substance of the plea is sufficiently set out. The following charges were given at the request of defendant:

(1) The court charges the jury that plaintiff has sued defendant for loss and damage which the plaintiff claimed to have been done to a certain stock of groceries, to-

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bacco, and other merchandise by fire, and, if the jury should find for plaintiff, then they must include in the damages to the said stock of goods only such damages as the jury may be reasonably satisfied was done as the direct result of fire and water, and must not include in such damages any loss that the plaintiff may have suffered by reason of damages done to the stock of goods in any other way.

(2) This is a suit by plaintiff against defendant for the recovery of damages done to a certain stock of goods by reason of fire; and if the jury are reasonably satisfied from the evidence that the building in which said goods were contained collapsed or fell on account of its inherent weakness, or from any other cause other than fire, then plaintiff could not be entitled to recover against defendant for any damages which may have been caused to said stock of goods by the falling of the building, even though the jury may believe that the building was on fire before it fell.

(3) If the jury find from the evidence that the building in question, in which plaintiff's stock of goods were stored, caught fire before it fell to the ground, but that none of the plaintiff's goods were on fire prior to the collapse of the building, and if the jury are further reasonably satisfied from the evidence that the building collapsed and fell by reason of its inherent weakness, or for any other cause other than fire, and that the only damage that accrued to the stock of goods occurred after such collapse, and by reason of the fact that the building fell, and by reason of damages done to the goods by fire after the collapse, then the jury should find for defendant.

WEBB & MCALPINE, for appellant. Although the building had been weakened by some cause other than

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the fire so that it would have more readily fallen, yet if its final fall was from the effect of the fire, the company would be liable.—90 N. Y. Supp. 1035; 99 App. Div. 221; 123 Fed. 257; 21 Am. Rep. 703; 155 Cal. 708; 74 N. E. 421; 23 S. W. 140; 81 Ill. App. 231. Counsel discuss other assignments of error, but without citation of authority.

BESTOR & YOUNG, for appellee. On the discussion of counsel for appellant the court would be entirely justified in refusing to consider the questions sought to be raised by the assignments of error.—*B. R. L. & P. Co. v. Martin*, 148 Ala. 10; *Scarborough v. Borders*, 115 Ala. 436; *Smith v. Freeman*, 75 Ala. 285. In any event, under the policy here sought to be recovered on the defendant is not liable for, "while the part that should fall in order to avoid the policy should be a substantial and material part of the building, it would not be necessary for it to be so great a part as would destroy the distinctive character of the structure. In such case the structure could no longer be considered a building but only debris or ruins."—*Home Insurance Co. v. Tomkies*, 71 S. W. Rep. (Texas) 812 and 814; *Nicholls v. Sun Insurance Co.*, 14 South. Rep. (Miss.) p. 263; *Hick v. Globe Insurance Co.*, 127 (Mass.) p. 306; *Nelson v. Traders Insurance Co.*, 181 (N. Y.) 472; Ostrander on Insurance, section 314; May on Insurance, section 412; *Moody v. Connecticut Ins. Co.*, 117 Pac. (Cal.) 773; *Kiesel v. Sun Ins. Co.*, 88 Fed. p. 245, 171 U. S. 688; *Foster v. Home Ins. Co.*, 143 Fed. p. 307; *Transatlantic Fire Ins. Co. v. Bamberger*, 11 S. W. (Kentucky) 595; *Orient Ins. Co. v. Leonard*, 109 Fed. 288; *Orient Ins. Co. v. Leonard*, 120 Fed. 811; *Pelican Ins. Co. v. Troy*, 13 S. W. (Texas) 980; *Phoenix Ins. Co. v. Boren*, 18 S. W. p. 484.

[Ogburn-Griffin Gro. Co. v. Orient Insurance Company.]

GARDNER, J.—This was a suit upon a fire insurance policy covering a stock of groceries belonging to the Ogburn-Griffin Grocery Company, brought by appellant against appellee.

The defendant pleaded the general issue and also several special pleas setting up the provisions of the policy, whereby it was provided that: "If a building or any part thereof fall, except as a result of fire, all insurance on such building or its contents shall immediately cease."

These special pleas alleged that the building which contained said stock of goods, or a substantial part of said building, fell, not as a result of fire, but as the result of its own inherent defects, weaknesses, overloading, etc. There was also an attempt to set up, by several special pleas, the breach by the plaintiff of certain conditions of the "iron-safe clause"; but these pleas finally went out on demurrer.

It appears from the record, therefore, that the real issues litigated between the parties on the trial of the cause was that raised by those pleas setting up the avoidance of the policy because the building or a substantial part thereof fell, not as a result of fire, but of its own inherent weakness.

The trial resulted in a verdict by the jury in favor of the defendant, and the plaintiff prosecutes this appeal.

The assignments of error relate to the action of the court in giving certain written charges requested by the defendant. The first assignment relates to charge numbered 1, given for the defendant. This charge relates to the damages recoverable, and is based upon the hypothesis "if the jury should find for the plaintiff." The jury, however, returned a verdict for the defendant, and, if there was any error in giving the charge, it was without injury.—*Huson Ice & M. Works v. Bland & Chambers*.

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167 Ala. 391, 52 South. 445; *B. R. L. & P. Co. v. Demmins*, 3 Ala. App. 359, 57 South. 404; *Gordon v. Sullivan*, 116 Wis. 543, 93 N. W. 457; 2 Am. Dig. (Dec. Ed.) § 1068, subd. 4.

The criticism of counsel in brief, directed to this charge, only tends to show that the charge had a misleading tendency. If the falling of the building was the result of fire, then, of course, damage done to the goods of the plaintiff by the falling walls and debris would be the result of the fire and within the terms of the policy.—2 May on Insurance, § 412. If the plaintiff apprehended that the charge as given might mislead the jury, or had a misleading tendency, the remedy, was to ask an explanatory charge. It is the general rule recognized by this court that the giving of a charge with misleading tendency is not reversible error.—2 Mayf. Dig. 573; *B. R. L. & P. Co. v. Demmins*, *supra*.

Charges 2 and 3, given for the defendant; constitute the second and third assignments of error; and, as they are treated by counsel in brief by one argument and as presenting the same question, we will so consider them. These charges are free from error. They simply affirm and follow the plain provisions of the policy. They state the issues raised by the special pleas, and which appears to have been the real litigated question in the case.—*Foster v. Home Ins. Co.*, 143 Fed. 307, 74 C. C. A. 445; *Kiesel & Co. v. Sun Insurance Office*, 88 Fed. 243, 31 C. C. A. 515.

There appear on the record 18 assignments of error, each relating to the action of the court in giving a certain charge at the request of the defendant. The charges are referred to in the assignments by numbers and transcript pages. The brief of counsel for appellant, however, discusses 26 assignments of error, and as to each assignment (following the first 3 treated above) refers

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to a charge not referred to in the assignment and, in some instances to charges which do not appear at all in the transcript. An illustration may be cited in the fifth assignment, which refers to charge 9. Brief of counsel states that this assignment refers to charge 7. There is no charge 7 shown in the record as given for defendant. There are also other instances, like that noted.

In brief of counsel we also note, as to the fourth assignment, the following: "The fourth assignment is waived." This assignment refers to charge 8. When the sixth assignment is reached in argument, counsel state it refers to charge 10, and charge 8 was embraced in the fourth assignment, which was expressly waived. A few other such instances are noted, showing a waiver of assignments in one portion of brief and an argument of them in another. The brief was doubtless prepared in much haste and probably under some difficulties, as might appear from the affidavit on file, offered upon application to reinstate the cause after dismissal of appeal for failure to file brief within the required time. So far as counsel are concerned, all this may be entirely excusable, as one might conclude from the affidavit referred to. Had there appeared only an occasional such error, a different question would be presented. But such is not the case. Not an assignment of error following the first three is correctly referred to in brief.

Rule 10 of this court, as in force at time of submission of this cause (Code 1907, p. 1508), requires that: "The appellant, in order to prepare a case properly for submission when called, shall have filed a brief of the points relied on, in accordance with, and confined to, the distinct specifications contained in his assignments of error, each ground of error insisted on being separately presented and numbered in proper order. Each point shall be stated in the form of a proposition, un-

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less the assignment of error is itself in that form, and then it will be sufficient to copy the assignment."

That there has been a violation of this rule, although doubtless entirely unintentional on the part of counsel, there can be no question. It is equally apparent that such a violation is productive of much confusion to the court, in the study of the record and the preparation of an opinion, with the consumption of much unnecessary time and consequent delay. The point is strenuously urged upon us by counsel for appellee.

We are not at all disposed to a strict construction of such rules, but are rather inclined to construe them liberally in favor of litigants who show substantial compliance with their terms. But we cannot permit them to be ignored or entirely disregarded, however innocently, for they were framed and adopted to facilitate business and be an aid to the court in its prompt and orderly disposition, a result in which the profession and those whom it represents are greatly interested. If the rule is to be enforced at all, and even as construed most liberally, we are of the opinion that in this case we should consider the remaining assignments of error as waived, for the reasons above assigned.—1 Amer. Digest (Dec. Ed.) "Briefs," §§ 755 to 761, inclusive; *Winkler v. Hawkes & Ackley*, 126 Iowa, 474, 102 N. W. 418; *Kinnon v. L. & N. R. R. Co.*, 187 Ala. 480, 65 South. 397.

It results that the judgment of the court below is affirmed.

Affirmed.

MCCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

[Baker v. Britt-Carson Shoe Co.]

Baker v. Britt-Carson Shoe Co.

Assumpsit.

(Decided November 7, 1914. 66 South. 475.)

1. *Justice of the Peace; Pleadings.*—In the justice court, no particularity is required as to pleading, and the action of the court in overruling demurrers to a complaint containing the common count for balance due for goods sold; account; interest due on account, and for error as to invoice, was not erroneous.

2. *Appeal and Error; Harmless Error; Striking Pleading.*—Where a party had the benefit of the same defenses by plea which was not stricken, no harm resulted from the striking of other pleas setting up the same defense.

3. *Pleading; Striking Plea.*—It is proper to strike frivolous pleas on motion made to that end.

4. *Account; Evidence; Best and Secondary.*—Where the action was for the balance due on account, it is competent to permit a witness to testify that he had a statement of all the items introduced in evidence when he went over the account with defendant; this not being an attempt to prove the contents of the written statement, but only to prove its existence so as to make it an agreed or stated account at the time the parties went over the account.

5. *Same.*—Where defendant introduced a letter written plaintiff enclosing a check to be applied to his old account, promising to pay the balance, and asking that a note be sent to close up the invoices of certain purchases, and plaintiff introduced a letter in reply stating that the check had been placed to defendant's credit, that a note was enclosed as requested, and that another note for the balance of the old account with interest to date was also enclosed, it was competent to introduce evidence as to the authenticity of this last letter, and that it was properly directed, mailed, etc., such letter making a sufficient predicate for proof as to the amount due on the account at the date of the letters.

APPEAL from Coosa Circuit Court.

Heard before Hon. A. H. ALSTON.

Assumpsit by the Britt-Carson Shoe Company against D. W. Baker. Judgment for plaintiff and defendant appeals. Affirmed.

RIDDLE, ELLIS & RIDDLE, and RIDDLE & BURT, for appellant. Interest is not allowed on running accounts

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so long as they are open, and remain open and unliquidated in the absence of some statutory provision or some contract of the parties to that effect.—22 Cyc. 1015. Interest does not constitute a distinct claim, and can only be recovered with the principal.—22 Cyc. 1571. Motion to strike is not the proper way to reach defects in pleading.

JOHN A. DARDEN, for appellee. There was no error in the action of the court either as to the pleadings, or the admission of evidence.—§ 4622, Code 1907; *McQueen v. Whetstone*, 127 Ala. 418. It is proper to strike immaterial or frivolous pleas.—*Dix v. Belserd*, 80 Ala. 369. Interest is recoverable as a matter of law.—§§ 4619, 4620, Code 1907; *Motlow v. Johnson*, 151 Ala. 276; *Flinn v. Barbour*, 64 Ala. 193.

MAYFIELD, J.—Appellee sued appellant in a justice court, and there obtained a judgment. Appellant appealed to the circuit court, where the case was tried de novo. The circuit judge directed a verdict for the plaintiff, and judgment was rendered thereon, from which judgment this appeal is prosecuted.

The action in the justice court was in assumpsit, claiming on the common counts: (1) for balance due for goods sold and delivered; (2) on account; (3) for interest due on account; (4) for interest due on accounts, with the facts and the dates; (5) for error as to an invoice of goods sold. Demurrers were properly overruled as to each count. The counts were each good, if the action had been originally brought in the circuit court, and of course were sufficient in a justice court, where no particularity is required as to pleadings.

The defendant filed nine pleas, the last seven of which were special. The circuit court on motion struck all the

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pleas except plea 1, the general issue, and special plea 4. If there was any error as to this ruling, it was as to pleas 2, 3, 5, and 6; and as to these it clearly appears to have been without possible injury. Pleas 7, 8, and 9 were frivolous, and were properly stricken. Plea 4 was but another way of raising the general issue, which plea 1 raised. Pleas 2, 3, 5, and 6 attempted to set up the same defense as that set up in plea 4. Plea 4 was as follows: "That the said account is for interest on an open account between the plaintiff and the defendant, during the years 1907, 1908, and 1909, and at various and sundry times during said years the plaintiff and defendant had settlements, and the defendant paid the plaintiff in full of his said account with the plaintiff, and that not until this defendant had paid the plaintiff in full of what the said defendant was indebted to the plaintiff did the plaintiff make known to the defendant that there was any interest due by this defendant, which notice was given to the defendant long after this defendant had paid the plaintiff in full of his account with the plaintiff, and which notice was given this defendant on or about the 12th day of October, 1909."

The plaintiff, on the trial, added counts A, B, and C. They were not different in any respect from the original counts, and, being practically in Code form, were sufficient. The evidence did not prove plea 4 as claimed by appellant, and he was not entitled to the general affirmative charge as to this plea.

There was no error in overruling defendant's objection to the question to the witness Britt as to whether he had a statement of all the items introduced in evidence when he went over the account with the defendant, nor in declining to exclude the answer thereto that the witness brought the statement when he came. This was not an attempt to prove the contents of the written

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statement, but only to prove its existence at the time the parties went over the accounts, so as to make it an agreed or stated account at that time. The accounts were in evidence and spoke for themselves, and this did not tend to contradict them.

The defendant introduced a letter from the defendant to the plaintiff, which was as follows: "Goodwater, Alabama, July 26, 1909." "Britt-Carson Shoe Company, Columbus, Georgia—Gentlemen: Inclosed please find check for \$50.00 to apply to my old account. I will send you the balance on my old account just as soon as I can. Rest easy I will pay you every cent I owe you. Please send me note to sign to close up invoices of purchases in March and April, making same payable on November 1st, after date." "Yours very truly, D. W. Baker."

The plaintiff introduced a letter in response to the above letter as follows: "July 26, 1909." "Mr. D. W. Baker, Goodwater, Ala.—Dear Sir: We are in receipt of your favor of even date, with check for \$50.00, which we have passed to the credit of your account, with thanks. We are also complying with your request as to the purchases in March and April, and are inclosing note for \$285.25, which includes interest, as well as principal, for these two invoices, same payable November 1st, as you request, and in order to get our books in balance, as well as our needing this paper, we inclose another note for the balance of the old matter, which, with interest to due date, amounts to \$110.20. We would appreciate your prompt attention, as we want to use these papers Wednesday." "Yours very truly, Britt-Carson Shoe Co."

There was no error in showing the authenticity of this letter and that it was properly directed, mailed, etc.; nor was there any error in allowing the plaintiff to prove the amount due at the date of these letters. The

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letter clearly made a sufficient predicate for the proof. The plaintiff then introduced a number of other letters tending to show that the stated balance, with interest, was not paid when due and as promised in the letter.

The only contested questions on the trial were whether or not the defendant was liable for interest on his old account, after it was due, and, if liable, whether or not he had paid it. On the undisputed facts he was liable for interest as matter of law, and these facts show that he had not paid the interest. The court, therefore, properly gave the affirmative charge for the plaintiff.

Affirmed.

ANDERSON, C. J., and MCCLELLAN and SOMERVILLE, JJ., concur.

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Assumpsit and Trover.

(Decided November 7, 1914. 66 South. 446.)

1. *Trover; Demand; Necessity.*—One who takes possession of chattels belonging to another, even under a bona fide belief of a right to do so, takes them wrongfully and is guilty of a conversion thereof, and no demand is necessary before suing in trover.

2. *Appeal and Error; Review; Discretion.*—The extent to which cross-examination will be allowed or limited is within the sound discretion of the trial court, and will not be reviewed unless abused.

APPEAL from Marengo Law and Equity Court.

Heard before Hon. EDWARD J. GILDER.

Dora Evans sued J. B. Meador in assumpsit and in trover, and had judgment from which defendant appealed. Affirmed.

I. I. CANTERBERRY, and PATRIDGE & HOBBS, for appellant. The corn was taken possession of by the tacit con-

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sent of plaintiff, and the demand for its return was necessary before trover could be maintained.—*Wilson v. Curry*, 149 Ala. 368; §§ 4734, 4739, Code 1907.

WILLIAM CUNNINGHAME, for appellee. Under the authorities cited by appellant, and under the facts in this case, no demand was necessary. It is within the sound discretion of the court to control the cross-examination, and the exercise of such discretion will not be reviewed unless abuse is shown.

GARDNER, J.—This suit was brought by appellee against appellant, the complaint consisting of three counts: One, in trover, for the wrongful conversion by defendant of 125 bushels of corn, and one cow and calf, the property of the plaintiff; one, for money had and received; and, one, on open account. There was judgment for the plaintiff, and the defendant appealed.

The cause was tried by the court without a jury. The judgment does not disclose precisely upon which count of the complaint it was rendered, but it would seem to have rested upon the first, which is the count in trover, and it is so treated by counsel, and will be so considered here.

There does not appear to have been any special finding of facts requested by either party.—Acts 1909, pp. 355-356.

There are but two assignments of error. One, that “the court erred in rendering judgment for plaintiff against defendant.” It is insisted by counsel for appellee that this assignment cannot be considered, for the reason that the bill of exceptions does not show an exception to the judgment.—*Davis v. Simpson Coal Co.*, 162 Ala. 424, 50 South. 368. In this, however, counsel are mistaken, for, as we read the bill of exceptions, the exception so appears, as found on page 17 of the transcript.

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The insistence of counsel for appellant as to this assignment consists in failure to prove a demand made by the plaintiff on defendant, for the property, for the conversion of which the suit was brought. This insistence, however, presupposes that the defendant (following argument of counsel) acquired the property rightfully, as by consent of plaintiff. We do not, however, so read the record, and it is our opinion that it does not show any consent on the part of plaintiff. We think the record shows that the property was acquired, in the eyes of the law, wrongfully. We say, "in the eyes of the law" there appears a wrongful acquisition, so as to make clear that there is no intimation of a moral wrong on the part of the defendant; as the record would indicate that he acted upon the bona fide belief that he had a moral, as well as a legal, right to do as he did.

"The wrongful assumption or dominion over property of another is subversion and denial of his rights constitutes a conversion of such property irrespective of whether there was a demand made for the surrender and a refusal to surrender said property."—*Woods v. Rose & Co.*, 135 Ala. 297, headnote 1, 33 South. 41; *Moore v. Monroe Refrigerator Co.*, 128 Ala. 621, 29 South. 447.

The cause was determined upon evidence for the plaintiff alone, the defendant offering no proof.

There appears no serious controversy of fact, that the property was that of the plaintiff. The taking of the property of the plaintiff, under the circumstances disclosed by this record, was, in a legal aspect, wrongful, and so the assumption of dominion over it, in subversion of the rights of the plaintiff, was "conversion," and therefore no demand was necessary.

The only remaining assignment of error relates to the ruling of the court in sustaining objection to the question of the defendant, propounded to the plaintiff as a

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witness, as to who advised her "to put in a claim for this corn." This question came near the close of a rather full cross-examination of plaintiff by the defendant, in which defendant elicited the particulars as to how plaintiff acquired the corn, etc. The evidence was without any material conflict, and the question as to who advised her to put in a claim to the corn cannot be said to call for an answer relevant and material to any issue in the case, and it therefore comes within the rule providing that the latitude and extent of cross-examination as to such matters rests largely in the discretion of the trial court, and will not be reviewed unless abuse thereof is shown.—*Mitchell Square Bale Ginning Co. v. Grant*, 143 Ala. 194, 38 South. 855; 6 Mayf. Dig. p. 372.

We are of the opinion that no reversible error appears in the record, and the judgment of the court below is therefore affirmed.

Affirmed.

MCCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

Sessoms Grocery Co. v. International Sugar Feed Company.

Assumpsit.

(Decided November 7, 1914. 66 South. 479.)

1. *Courts; Jurisdiction; Non-Residents.*—One who claims a right of action for damages against a non-resident must sue for same in the state of the residence of such non-resident, unless, without a fraud on the law, he can obtain service upon such non-resident in this state, by process of attachment, or some other legal way.

2. *Same; Grounds; Fraud.*—Where a resident who claims a right of action against a non-resident for breach of an agreement of sale, ordered a carload of food stuffs from such non-resident with the

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ostensible purpose of paying for it in cash upon its arrival in this state, and such carload of food stuff was shipped with bill of lading attached, and instead of paying said draft, the said consignee brought action against said non-resident, and attached the contents of the car, this was such a breach of faith as to deny to the consignee the right to litigate its claim in this state, as courts will not lend their jurisdiction to those seeking to obtain it by a fraud upon the law.

3. *Sales; Passing Title; Order Notify.*—Goods shipped with bill of lading attached, order notify, remain the property of the seller after they have reached the station of the buyer until the draft is paid which is attached to the bill of lading.

4. *Appearance; Waiver of Jurisdiction.*—Where the resident plaintiff could not maintain its action because of a breach of faith amounting to a fraud upon the law, an appearance by defendant to contest the jurisdiction of the court did not waive the rights set up in the plea.

APPEAL from Andalusia City Court.

Heard before Hon. ED T. ALBRITTON.

Assumpsit by the Sessoms Grocery Company against the International Sugar Feed Company. Judgment for defendant on the pleadings, and plaintiff appeals. Affirmed.

The writ of attachment was sued out by the Sessoms Grocery Company and levied upon a car load of food-stuff shipped to it by the International Sugar Feed Company from the state of Tennessee to Andalusia in the state of Alabama, "order notify, Sessoms Grocery Company." The plaintiff filed a complaint, alleging damages for breach of agreement of sale, and also containing the common counts. Defendant appeared specially and interposed a plea to the jurisdiction of the court, setting up the facts above stated and alleging that defendant was a non-resident, and that plaintiff ordered said car of foodstuff shipped into the state of Alabama for the purpose of levying such attachment upon the same, and thereby acquiring service upon this defendant for the purpose of enforcing the damages set forth in the complaint, also further alleging that such foreign corporation had not been served by any process which would authorize jurisdiction except the levying of this attach-

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ment, and demanding that the issues presented by the foregoing plea, and such other pleas as may arise in this case, shall be tried by a jury. The plaintiff moved to strike the plea for reasons set out, and, the same being overruled, filed demurrers to the plea, which were also overruled. Plaintiff then filed a general replication and special replications admitting want of service personally, or upon any authorized agent of defendant in this case, but setting up the affidavit, the writ of attachment, and the levy of the same upon the car load of stuff after it arrived in Alabama, and publication in accordance with the statute in such cases made and provided. Demurrers were sustained to these special replications, and plaintiff declines to plead further, and appeals.

POWELL & ALBRITTON, for appellant. The court erred in its rulings on the pleadings to the injury of appellant.—2 Enc. P. & P. 620-1.

PARKS & PRESTWOOD, for appellee. The appearance and plea was not a waiver of a right to question the jurisdiction of the court.—*Pullman P. Car Co. v. Harris*, 122 Ala. 149. The service was void because amounting to a fraud on the law, and the court acquired no jurisdiction of the non-resident defendant.—4 Cyc. 574; 32 Cyc. 448-556; *Pomeroy v. Parmlee*, 74 Am. Dec. 328; 5 Cent. Dig. 414; *Ex parte Hearn*, 92 Ala. 110; 137 U. S. 98; 29 Am. Dec. 218.

DE GRAFFENRIED, J.—The International Sugar Feed Company is a non-resident. The Sessoms Grocery Company is a resident of this state. Both parties appear to be merchants, and the Sessoms Grocery Company claims that it possesses a right of action for damages against the International Sugar Feed Company. If so, it must sue the International Sugar Feed Company

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in the state of its residence unless, without a fraud upon the law, it can, either by process of attachment or in some other legal way, obtain service—or that which is regarded as tantamount to service—upon said Sugar Feed Company in this State.

Our courts will not, either by process of attachment or by summons, lend jurisdiction to those who seek to obtain it by a fraud upon the law. Our courts are open to litigants, but those who come into them must come into them in an open fashion. Those who undertake to enter them through a fraud upon the law will be denied admittance.—*Ex parte Hurn*, 92 Ala. 102, 9 South. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23; *Cunningham & Son v. Baker, Peterson & Co.*, 104 Ala. 160, 16 South. 68, 53 Am. St. Rep. 27; *Steele v. Boyd*, 6 Leigh (Va.) 547, 29 Am. Dec. 218; *Steele v. Bates*, 2 Aikens (Vt.) 338, 16 Am. Dec. 720; *F. & M. Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523, 15 Pac. 562; *Pomroy v. Parmless*, 9 Iowa, 140, 74 Am. Dec. 328.

We think that the pleadings in this case show that the relations of the Sessoms Grocery Company to the car of foodstuff upon which the attachment was levied were such as to preclude it from levying its attachment upon it. This car of foodstuff was ordered by the Grocery Company from the Sugar Feed Company ostensibly with the purpose of paying for it in cash upon its arrival at Andalusia. The car was shipped at the request of appellant upon "order notify," and we take it that this means that the car was shipped with bill of lading attached to a draft for the agreed price of the foodstuff, and that, when the car reached Andalusia, the title to its contents still resided in appellee. It may be that appellee solicited this order from the appellant, but it is plain from all of the pleadings that when the car was shipped,

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it was the understanding on the part of the appellee—from all that had been said and done pending the negotiations—that the draft, upon the arrival of the car in Andalusia, would be paid in cash. The appellant *must* have known that, upon the faith of *that specific* understanding, this car was shipped, *pursuant to its order*, by appellee from the state of Tennessee to Andalusia, Ala. Instead of paying the draft, however, the appellant *attached the contents of the car*. The appellant cannot be permitted to use this breach of faith on its part as the means of litigating in this state with appellee the validity of its alleged right of action against the appellee.

(3) The appearance of the appellee in this case was for the purpose of challenging the jurisdiction of the court, and its appearance did not waive or impair that right. In other words, the appellee did not, by anything it did, voluntarily submit itself to the jurisdiction of the court, and it cannot be held to have waived the rights which it set up in its plea.—*Grigg, Adm'r v. Gilmer*, 54 Ala. 425.

The rulings of the trial court were in accordance with the above views, and the judgment of the court below is affirmed.

Affirmed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

[Rike v. McHugh & Groom.]

Rike v. McHugh & Groom.*Assumpsit.*

(Decided November 7, 1914. 66 South. 452.)

1. *Brokers; Compensation; Ability and Willingness of Purchaser; Waiver.*—Before a broker is entitled to commission he must procure a purchaser able and ready to comply with the terms and conditions of sale, and while the condition as to the ability of the purchaser is waived if the owner accepts him knowing or with notice that he is not able, or will not be able to comply with the terms of the sale, yet where no contract is made between the owner and such purchaser, there is no such waiver, though the owner accepts the purchaser, unless at the time of the acceptance he has notice of the purchaser's inability or unwillingness to comply with the terms of the sale.

2. *Same; Instruction.*—A charge that if an agent communicated to an owner the name of a purchaser, and the owner accepted the purchaser without objection, that in law, operated as a waiver of the requirement that the purchaser be ready, able and willing to buy, although erroneous, was not harmful where the uncontradicted evidence was that the purchaser was ready and willing to purchase, and the failure to carry out the contract arose from some other cause; and this is especially true in view of the fact that the court further charged that unless the owner accepted the prospective purchaser without qualification, then the evidence must reasonably satisfy the jury that the purchaser was able to make the required payments.

3. *Same.*—Where the evidence was uncontradicted that the prospective purchaser was ready, able and willing to make and comply with the terms of sale, and that the contract fell through from some other cause, a charge asserting that unless the jury were reasonably satisfied from all the evidence that the purchaser was able to pay cash for the property on or before a certain date, then they should find for defendant, was misleading and inapplicable to the evidence.

4. *Evidence; Letters; Preliminary Proof.*—Unless it is in reply to a communication sent by the addressee thereof, a letter or telegram received in due course is not admissible as evidence against the purported sender thereof, without proof that he sent it, or proof of his handwriting.

5. *Same.*—It was proper to admit in evidence a telegram where it was shown that it was in response to a telegram sent to the purported sender thereof, and it further appeared that a letter of the same date fully covered and confirmed the matter set out in the telegram.

6. *Appeal and Error; Harmless Error; Evidence.*—The admission in evidence of the telegram without the necessary preliminary proof was harmless, or cured by the subsequent introduction of a subsequent letter clearly referring to the telegram, and covering the same mat-

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ter; especially where it appeared that subsequent to the telegram all negotiations between the parties were broken off, and that it was by reason of a renewal of their relations that further proceedings were had, and plaintiff's claim was not dependent upon nor controlled by such telegram.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNY.

Action by McHugh & Groom against E. G. Rike, for work and labor done. Judgment for plaintiff, and defendant appeals. Affirmed.

The controversy seems to have been over the sale of a house belonging to Rike; the sale having been made through the agency of plaintiffs to one Mr. Seeberg, which fell through for some reason not disclosed by the record, but after considerable correspondence had passed between the parties, and after the papers had been delivered by Rike to one Moore. The charge complained of appears in the opinion. The charge made the basis of the eleventh assignment of error is as follows (requested by defendant):

"I charge you, gentlemen, that unless you are reasonably satisfied from all the evidence that Mr. Seeburg was able to pay cash for the said property on or before November 1, 1913, then you should return a verdict for defendant."

GORDON & EDDINGTON, for appellant. The court erred in allowing the telegram of May 5, to be introduced in evidence.—§ 3972, Code 1907; *O'Connor M. & M. Co. v. Dixon*, 112 Ala. 208; *L. & N. v. Britton*, 149 Ala. 554. The court erred in not excluding plaintiff's evidence on motion, as it did not disclose that the purchaser was ready, able and willing to purchase said property upon the terms and conditions prescribed by the owner.—*B'ham L. & L. Co. v. Thompson*, 86 Ala. 149; *Sayre v. Wilson*, 86 Ala. 156; *Smith v. Sharp*, 162 Ala. 439. On

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these authorities, counsel insist that error prejudicial intervened in the charges given for plaintiff and refused to defendant.

WILLIAM COWLEY, for appellee. The telegram was in response to previous communications, and was fully covered and identified by the letter which was admitted between the parties. No waiver is shown.—40 Cyc. 254. There was no error in the charges.—*Allen v. White*, Minor, 365.

GARDNER, J.—The general rule of law is everywhere recognized to be that: "To entitle an agent or broker to commissions, he must show that he procured a purchaser who was able and ready to comply with the terms and conditions of sale."—*Cook v. Forst*, 116 Ala. 395, 22 South. 540; *Birmingham v. Thompson*, 86 Ala. 146, 5 South. 473; *Sayre v. Wilson*, 86 Ala. 151, 5 South. 157; 19 Cyc. 246; *Smith v. Sharpe*, 162 Ala. 439, 50 South. 381, 136 Am. St. Rep. 52.

The court charged the jury that: If "the real estate agent communicates to the owner the name of the purchaser without objection, then that, in law, operates as a waiver of the requirement that the purchaser be ready, willing, and able to buy. In other words, the owner of the property takes that risk for himself, whether the man is able to buy or not."

There is no doubt about the fact that if the owner of the property, at the time he accepts the purchaser, knows or has notice that he is not or will not be able to comply with the terms of sale, and with that knowledge accepts him as a purchaser, though a binding contract is never made between them, the owner would thereby waive such condition.

In the case of *Sayre v. Wilson*, *supra*, the purchaser was a feme covert, which fact was known to the owner,

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and he, with that knowledge, accepted her, thereby waiving that infirmity.

The rule with reference to the exact point in hand seems to have been decided in the case of *Kalley v. Baker*, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542, that a broker employed to sell property becomes entitled to his commission when he finds a purchaser satisfactory to his employer, and they enter into a contract of purchase and sale, though it subsequently turns out that the purchaser is unable to comply with his contract, and on that account the sale is not consummated by transfer of the property. This question also came up in the case of *Scully v. Williamson*, 26 Okl. 19, 108 Pac. 395, 27 L. R. A. (N. S.) 1089, Ann. Cas. 1912A, 1265, wherein it is said: "In the case at bar the broker brought to the owner of the property a prospective purchaser, with whom the owner was satisfied, and with whom he executed a contract for a sale, thereby determining for himself the ability of the purchaser to purchase. For any violation of this contract by the purchaser, defendant had his remedy for damages for the loss sustained by him by reason of the purchaser failing to fulfill his contract."

The same rule seems to be recognized in the case of *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; 19 Cyc. 270, 271, and citations in note.

So that, though the owner may accept the proposed purchaser, yet, if no contract is made between the owner and such purchaser, the owner does not seem to waive the condition that the purchaser be able, ready, and willing to comply with the terms of the purchase, unless, at the time of his acceptance of him as such purchaser, he had notice of a want of these conditions.

It would therefore appear that the charge of the court, hereinabove quoted, is erroneous as an abstract propo-

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sition of law; but we are of the opinion that, under the evidence as disclosed by this record, it was not a reversible error.

The evidence shows, beyond disputed or controversy, that the purchaser was able, ready, and willing to comply with the terms of the contract, and that the failure to carry out the contract was upon some other ground. He showed ability to put up as much as \$100, cash, and \$500 November 1st, when the trade was to be consummated, and plaintiffs had arranged and agreed to lend him the balance. There was no evidence to the contrary, and therefore the further charge of the court as to the acceptance of him by the owner could not prejudice the rights of the defendant in this case. In addition to this, however, the court, immediately following this portion of the oral charge excepted to, explained the former part of said charge, wherein he directed the jury as follows: "Unless you believe that the name of Seeberg (that is, of the intending purchaser) was communicated to Mr. Rike, and that he accepted him without any qualification, then the evidence must reasonably satisfy you that Seeberg was able to pay the \$500 on the 1st of November and Groom's firm was able to pay the balance, in which event it would be the same thing."

It is undoubtedly true that, where a letter or telegram is received in due course, the same is not admissible as evidence against the purported sender thereof, without proof that he sent it, or proof of his handwriting, unless the same is in reply to a communication sent to him by the sendee thereof.—*L. & N. R. R. Co. v. Britton*, 149 Ala. 552, 43 South. 108; *O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 308, 20 South. 413.

It may be true that at the time the telegram, dated May 5th, was offered in evidence, it was subject to the objection interposed to it. This was cured, however, by

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the subsequent introduction of the letter of May 12th, which clearly refers to this telegram and covers the ground contained therein. Besides, it appears that, subsequent to this telegram, all negotiations were broke off, and it was by reason of a renewal of their relations that further proceedings were had. Plaintiff's claim is not at all dependent upon, nor controlled by, this correspondence, and it is only admissible at all as shedding light upon the subsequent communications between the parties.

With reference to the telegram of May 14th, the evidence shows that it was in response to a telegram sent to the defendant by the plaintiffs, and the letter of the same date also fully covers and confirms the matters set forth in said telegram.

The charge made the basis of the tenth assignment of error is covered by the charge given by the court to the jury.

The charge made the basis of the eleventh assignment of error had a tendency to mislead the jury, in the light of the evidence in the case.

We find no error in the record of which appellant can complain, and the judgment of the court below is affirmed.

Affirmed.

MCCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

[Buck Creek Lumber Co. v. Nelson, et al.]

Buck Creek Lumber Co. v. Nelson, et al.

Assumpsit.

(Decided November 7, 1914. 66 South. 476.)

1. *Appeal and Error; Record; Striking Bill of Exceptions.*—Under section 3019, Code 1907, a bill of exceptions must be filed within ninety days from the date of the judgment, and where it appears that it was not filed within that time it will be stricken on motion; a failure to file the bill within such period may be shown by parol.

2. *Contracts; Action; Breach; Complaint.*—A complaint in an action for a breach of contract need not show that the contract declared on was in writing.

3. *Corporations; Contracts; Powers of Officers and Agents; Limitations.*—Under subdivision 10, section 3446, Code 1907, a provision in the certificate of incorporation that the contracts of the corporation should be in writing, signed by its president and countersigned by its treasurer, was not a limitation upon its charter powers, but was in effect a by-law or regulation, not affecting the validity of contracts otherwise executed with persons who had no actual or imputed knowledge thereof; its liability in such case being one of agency as affected by the apparent scope of the authority of the agent acting for it.

4. *Same; Power; Ultra Vires.*—Strictly speaking, an act is ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose.

5. *Pleading; Replication; Necessity.*—Where the action was against a corporation for the breach of a contract, and the fact that, notwithstanding the alleged contract had not been reduced to writing, signed by its president and countersigned by its treasurer, its validity was thereafter recognized by a partial execution thereof, was admissible under the issues made by pleas of non est factum, and the general issue, replications to that effect were unnecessary; but the allowance of unnecessary replication was not reversible error.

APPEAL from Autauga Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by Frank Nelson, Jr., and another, as partners, against the Buck Creek Lumber Company, for breach of contract. Judgment for plaintiffs, and defendant appeals. Affirmed.

The judgment from which the appeal was taken appears to have been rendered October 25, 1912, the bill of exceptions was filed with the judge January 22, 1913,

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and appears to have been signed by the judge April 21, 1913. The affidavits show that the bill was really not signed until after May 1, 1913. There are no counter affidavits.

REESE & REESE, and POWELL & HAMILTON, for appellant. Counsel insist upon each assignment of error and reply upon the following authorities.—*Chewacla L. W. v. Dismukes*, 87 Ala. 344; *Cleveland S. F. Co. v. Greenville*, 146 Ala. 559; *So. Mut. Aid Co. v. Watson*, 154 Ala. 301; *U. S. S. F. & G. Co. v. Dothan*, 174 Ala. 487; Subd. 10, § 3446, Code 1907.

EUGENE BALLARD, and LEADER & EWING, for appellee. The bill of exceptions was not presented to the trial judge within ninety days, and this is mandatory, under § 3019, Code 1907. The bill should, therefore, be stricken.—*Leith v. Kornman, et al.*, 2 Ala. App. 311; *Rainey v. Ridgeway*, 151 Ala. 532; *Baker v. C. of Ga.*, 165 Ala. 466; *T. C. I. & R. R. Co. v. Perry*, 64 South. 651. Parol evidence is admissible to show that the bill was not presented as required by law.—Authorities supra. The assignments of error are too general, and are not sufficiently insisted upon.—*Mitchell v. Gamble*, 140 Ala. 545; Rule 10 Sup. Ct. Pr.; *Rhodes v. Charleston*, 148 Ala. 671. It was not necessary to allege whether the contract sued on was oral or in writing.—1 Ala. 52; 34 Ala. 129; 64 Ala. 29. There is an obvious distinction between an act done wholly without power to do it, and an act done within the powers of the corporation, although done informally.—10 Cyc. 1149. The act was ratified by the corporation by a partial performance of the contract.—*Simpson v. Harris*, 56 South. 969; 136 Pac. 174.

SAYRE, J.—Appellees' motion to strike the bill of exceptions must be granted. It seems quite clear that

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the bill was signed long after the expiration of the period prescribed by the mandatory terms of the statute, section 3019 of the Code. Affidavits submitted on behalf of the motion so state the fact, and it is not denied. The deposition of the presiding judge has not been taken, and he has refused appellees' request for an ex parte affidavit, but the terms of that refusal, when construed in connection with the language of the request, leave no doubt that the judge, while refusing the request for an affidavit, was careful not to deny the fact that the signing of the bill had been deferred beyond the statutory limit. Rather, he admits the fact by assigning a reason for it. Had the fact been otherwise, it cannot in reason be doubted that some sworn affirmation to that effect would be found in the record.

The statute is imperative in its requirement. The limit fixed by it cannot be extended to suit the exigencies of parties or cases. If a correct bill of exceptions had been presented, appellant might have established it by a proceeding in this court. That remedy he has not sought. According to our cases the failure to observe the statute may be shown by parol, and, being shown, must result in the bill being stricken.—*L. & N. R. R. Co. v. Malone*, 116 Ala. 600, 22 South. 897; *Rainey v. Ridgeway*, 151 Ala. 532, 43 South. 843; *Baker v. Central of Ga. Ry. Co.*, 165 Ala. 466, 51 South. 796.

Answering the argument made in support of those assignments of error based upon the record proper, it was not necessary that the complaint should show that the contract alleged to have been breached was in writing.—*Whilden v. M. & P. Nat. Bank*, 64 Ala. 29, 38 Am. Rep. 1.

By several special pleas it was made to appear that defendant's certificate of incorporation contained a provision as follows: "That no draft, bill of exchange, check, no bond or other evidence of liability or contract

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creating any liability on the part of the company shall be valid unless the same be in writing signed by the president and countersigned by the treasurer; and provided expressly that any liability otherwise created shall be null and void."

These pleas alleged that the contract mentioned in the complaint was not in writing signed by defendant's president and countersigned by its treasurer, and hence, these pleas conclude, the contract was ultra vires, void, and its breach constituted no cause of action. Demurrers to these pleas were sustained. In these rulings there was no error.

Subdivision 10 of section 3446 of the Code is as follows: "The certificate [of incorporation] may also contain any other provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the incorporation, the directors and stockholders, or any class or classes of stockholders; provided, that such provision be not inconsistent with this article or the Constitution of the state."

The argument for reversal goes upon the ground that those parts of the certificate of incorporation and of the statute appearing above have the effect of rendering the contract mentioned in the complaint void as being without the charter powers of the defendant corporation. We are not of that opinion. The requirement that contracts should be in writing, signed by the president and countersigned by the treasurer of defendant corporation, though appearing in the certificate of incorporation filed by the incorporators, is not a limitation upon the charter powers of the corporation, but is rather in the nature of a by-law, a rule of action prescribing merely a course or manner of corporate action without limiting the field in which such action may be taken. Strictly speaking, a corporate act is said to be ultra vires when

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it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purpose.—*Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300. The limitation that corporate contracts should be expressed in writing, signed by the president and countersigned by the treasurer, has not been imposed by the state. It does not enter into the constitution of the corporation; it is in essential nature a mere internal regulation, and as such it does not affect the validity of contracts executed without due observance of its prescription so far at least as concerns persons dealing with the corporation without actual or imputed knowledge of its by-laws.—*Lake Street, etc., R. R. Co. v. Carmichael*, 184 Ill. 348, 56 N. E. 372. The question of corporate liability in such case is one of agency as affected by the apparent scope of the authority committed to the agent who acts for the corporation, and strangers are not held to notice of by-laws placing special restrictions on the apparent authority of corporate agents.

It is to be further observed, and this of itself is enough to dispose of appellant's contention, that section 3446 of the Code relates to the mode of incorporation. The charter powers of corporations organized under the general laws of this state are laid down and fixed by article 5 of the Code which begins with section 3481.

For the reasons indicated above the demurrers to pleas 2, 3, and 4 were properly sustained.

In view of the principle adverted to above, replications, purporting to answer the pleas of the general issue and non est factum by showing that defendant, notwithstanding the alleged contract had not been reduced to writing, signed by its president and countersigned by its treasurer, did in fact thereafter recognize its validity, and in part execute the contract by which defendant's

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agent had attempted to bind it, did, in short, bind itself, were wholly unnecessary, since the facts alleged in them were admissible under, and sufficient proof of, the complaint; but there was no reversible error in allowing their unnecessary reiteration in the form of replications.

No reversible error appears in the record, and the judgment will be affirmed.

Affirmed.

MCCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

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Assumpsit.

(Decided November 7, 1914. 66 South. 438.)

1. *Commerce; Interstate; Collection of Goods at Port for Export.*—Where a foreign corporation bought lumber to be delivered in care of the vessel at Mobile, and there inspected and paid for at a specified price per M., the fact that lumber was purchased for export and intended to be loaded on vessel and continue its transportation to a foreign country, did not render the transaction one of interstate commerce so as to remove it from the operation of the state law providing that foreign corporations shall not do business within the state without complying with its laws.

2. *Sales; Delivery; Reasonable Time; Option.*—Where time for delivery of goods sold is at the option of the buyer, he must exercise his right within a reasonable time, and the seller is entitled to a reasonable time to make delivery after notice.

3. *Same; Pleading.*—The pleadings considered, and it is held that the allegations that plaintiff demanded delivery of the lumber within a reasonable time was a mere conclusion and insufficient, and that the allegation was also defective for failure to allege that defendant failed to make delivery within a reasonable time after demand.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Suit by the Mobile-Gulfport Lumber Company against W. H. Brunner for breach of a contract to deliver lum-

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ber. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Amended count 3 is as follows: Plaintiff claims of defendant \$100, for that by written contract with defendant, on, to-wit, July 25, 1911, defendant agreed to deliver to plaintiff by October 15, 1911, in care of vessel at Mobile, Ala., and plaintiff agreed to accept on such delivery at Mobile, Ala., 50,000 feet of lumber at \$14 per M feet to be inspected at the mills; that by subsequent agreement between said parties said original contract was modified in that defendant agreed to make delivery of said lumber after October 15, 1911, on demand of plaintiff therefor, to be inspected at Mobile, Ala., and that plaintiff agreed to accept said lumber after October 15, 1911, on said delivery by defendant on plaintiff's demand therefor to be inspected at Mobile, Ala.; that after October 15, 1911, and within a reasonable time after said subsequent agreement, plaintiff made demand on defendant for said delivery by defendant of said lumber, and that defendant failed to make said delivery of said lumber on demand from plaintiff therefor to plaintiff's damage, etc.; and that at the time of said demand plaintiff was ready, able, and willing to comply with its part of said original contract as modified by said subsequent agreement, and that upon said delivery of said lumber by defendant plaintiff was ready, willing, and able to pay defendant for the said lumber at said contract rate of \$14 per M feet.

LEIGH & CHAMBERLAIN, for appellant. The court erred in overruling the demurrer to the third count of the complaint.—35 Cyc. 181-2; *Davis v. Adams*, 18 Ala. 265; *Brady v. Green*, 159 Ala. 482; *Sloss-Sheffield v. Simpson*, 158 Ala. 590; *Carmelich v. Mims*, 88 Ala. 335. The court erred in overruling demurrers to the first special

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replication.—*Davis v. Adams, supra; Brady v. Green, supra; Ware v. Mobile County*, 146 Ala. 163; 209 U. S. 405; 228 U. S. 665; 227 U. S. 505; 116 U. S. 517; 121 N. W. 256. On the same authorities the court erred in overruling demurrers to the second special replication.

FRANK J. YERGER, and ELLIOTT G. RICKARBY, for appellee. The third count was sufficient and not subject to demurrer.—35 Cyc. 181. The contract was an interstate contract.—*Wright v. State*, 63 Ala. 14; 219 U. S. 512; 225 U. S. 110; 227 U. S. 111. These authorities dispose of all the errors insisted upon.

GARDNER, J.—Suit was brought by appellee against appellant to recover damages for an alleged breach of contract for the sale of lumber. The cause was tried on the third count of the complaint, defendant's pleas thereto, and plaintiff's two replications to pleas 2, 3, and 4.

Count 3 set up that by written contract of date July 25, 1911, the defendant agreed to deliver to plaintiff by October 15, 1911, in care of vessel at Mobile, Ala., and plaintiff agreed to accept on such delivery at Mobile, 50,000 feet of lumber, at \$14 per thousand feet, to be inspected at the mill; and that by subsequent agreement of the parties this original contract was modified to the extent that defendant agreed to make delivery of said lumber after October 15, 1911, on demand from plaintiff therefor, to be inspected at Mobile, and plaintiff agreed to accept said lumber after October 15, 1911, on said delivery, on plaintiff's demand therefor, to be inspected at Mobile.

There are then averments going to show the breach by failure to deliver the lumber, etc., not necessary to be considered at this stage of the opinion.

The defendant pleaded the general issue, and three special pleas, in substance, that the plaintiff was a for-

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foreign corporation, organized under the laws of some country or state other than the state of Alabama, and had not complied with the laws of this state relative to admitting foreign corporations to do business in this state; it being averred in each of said pleas that the alleged contract sued upon was attempted to be entered into in this state, and was to be wholly performed within the state.

There was no demurrer to these pleas, and no general replication thereto, taking issue on, or denying their allegations; but plaintiff filed to these pleas two special replications. While they are not identical, yet the two replications contain, and are treated by counsel as containing, the same, in substance, to the effect that the lumber contracted for was purchased by plaintiff for delivery in care of vessel at Mobile, Ala., for transportation to a foreign country in said vessel immediately upon delivery of said lumber in care of said vessel, and was so contracted for by plaintiff to fulfill a contract of plaintiff for the delivery of said lumber in said foreign country.

It is thus seen that the insistence of these replications is that the transaction constituted interstate commerce, and was therefore without the influence of the statute sought to be availed of in the special pleas. This is treated by counsel as the question of prime importance on this appeal.

What transactions constitute interstate commerce is a question oftentimes presented to the Supreme Court of the United States, but we will call attention to only a few of the cases we deem more nearly in point, and make but brief reference thereto.

In the case of *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, frequently cited in subsequent decisions, the opinion is prefaced by two questions, as fol-

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lows: "Are the products of a state, though intended for exportation to another state, and partially prepared for that purpose of being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state? Does the owner's state of mind in relation to the goods—that is his intent to export them, and his partial preparation to do so—exempt them from taxation? This is the precise question for solution."

Continuing, the opinion says, in part: "There must be a point of time when they cease to be governed and protected by the national laws of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. * * * Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state? * * * Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within

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the state, or never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

This case is cited approvingly in *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Supt. Ct. 266, 47 L. Ed. 349; and, after reviewing the above authority as well as others, the opinion states that: "The cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state."

The case of *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, is also in point and of interest in this connection. Several authorities are there reviewed, including those above cited. Speaking to the facts of the last-cited case, it was said in the opinion: "But neither the fact that the grain had come from outside the state nor the intention of the owner to send it to another state and here to dispose of it can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago, for his own purposes and with full power of disposition."

We make no attempt to here review the cases in detail, nor quote further extracts from the opinion, but cite, in this connection, these additional authorities: *Gulf, Colorado & Santa Fe Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; *Susquehanna Coal Co. v. Mayor*, 228 U. S. 665, 33 Sup. Ct. 712, 57 L. Ed. 1015;

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In re Conecuh River Lumber & Mfg. Co. (D. C.) 180 Fed. 249; *Ware & Leland v. Mobile County*, 209 U. S. 405, 28 Sup. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328.

Count 3 of the complaint upon which the suit was tried shows that the delivery of the lumber and the payment of the purchase money was concurrent, dependent obligations; in short a cash transaction (*Brady v. Green*, 159 Ala. 482, 48 South. 807) with delivery of the lumber by the seller at Mobile and privilege of inspection by the purchaser when so delivered at Mobile. The shipment therefore by the seller of the lumber to Mobile was not only for a delivery of same to the purchaser, but also for his inspection. The title to the lumber remained in the seller until inspected, accepted, and paid for by the purchaser. Until this was done, the purchaser had no authority over or control of its disposition. It cannot be successfully contended that under such a contract the lumber had started on its final journey to a foreign country, when placed in the cars by the seller and owner, for shipment to Mobile, to be first inspected by the purchaser and then either accepted and paid for, or rejected. If rejected, then most clearly it is still the property of the seller and remains among the general mass of property of the state subject to the state regulation. Nor can the fact that the purchaser contracted for the lumber with the intention of shipping to a foreign country alter the situation, as is clearly shown by the quotation above given. Such a shipment to Mobile under the contract upon which recovery is sought in this case may be termed what the above authorities might call "an interior movement of the property, for the purpose of putting it into a course of exportation," but no part of the exportation itself. As said in *Coe v. Errol*, *supra*: "Until shipped or

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started on its final journey out of the state its exportation is a matter altogether in fieri and not at all a fixed and certain thing."

Delivery of the lumber by the seller in Mobile, for inspection, and, if accepted, then for sale (the owner intending its shipment to a foreign country if accepted and purchased), would be but preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation, and no more the beginning of its actual exportation than is the assembling at the depot, where the journey is to commence, of the products of the farm, as illustrated in *Coe v. Errol*, *supra*, a part of that journey.

Many of the decided cases arose over the question as to whether or not the shipment was to be governed by state rates and regulations or by the federal authority, a solution of which, of course, rested upon whether it was a local or an interstate shipment.

We think the correctness of our position may be clearly demonstrated by this simple illustration: Suppose the purchaser here had intended the shipment for a point in the state of Mississippi. The seller places his lumber on the cars for shipment to Mobile, there to be first inspected by the purchaser and accepted or rejected. When the lumber arrives in Mobile, it is still the property of the seller until inspected and paid for. His bill of lading is for shipment to Mobile only. He may know or expect that the final destination is some point in Mississippi, but with this he is not concerned. The contract of the carrier is with him, and that contract is completed upon delivery of the lumber in Mobile. To move it beyond that point would require the intervention of an entirely new and independent shipment. Clearly, it cannot be contended that this shipment from one point in this state to Mobile, under such circumstances, would

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he governed by any interstate rate or rules, and yet, if an interstate shipment, such would of course be the result. As to whether the lumber is to reach a destination beyond this state might depend upon first, its acceptance and purchase by the purchaser, and, then, entirely upon his will or desire.

The appellee seems to rely upon the case of *Texas & N. O. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111. 33 Sup. Ct. 229, 57 L. Ed. 442, wherein the decision of the Court of Civil Appeals of Texas (reported in [Tex. Civ. App.] 121 S. W. 256) was reversed. We have carefully examined this authority, and conclude that it does not militate against the conclusion we have here reached. Indeed, the opinion begins with an allusion to the fact that the Supreme Court of Texas, in its last finding of fact, had declared that: "The shipments in controversy, together with other shipments of lumber to Sabine and Sabine Pass, constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine."

The effect of the decision, as we understand it, is that the fact that the initial shipment is with local bill of lading will not be given a controlling influence, and that while the transportation should be continuous it need not be by or through the initial carrier, the court looking at and considering the nature of the traffic rather than at what it calls its "accidents," to determine whether it is intrastate or foreign. Under the course of dealing between the parties, it was there held that the shipment by the seller originally was a link in the chain of continuous transportation, and the mere delays incident to the traffic did not destroy the continuity of the shipment. The court had before it no such situation as is presented by the pleadings in this case. The opinion cites, with approval, *Gulf, Colorado & Sante Fe. Co. v.*

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Texas, supra, and we think that what is said in reference to the facts of that case tends strongly to sustain our conclusion here. We will not repeat the facts; but what is pointed out as one of the controlling circumstances in that case is the fact that not until the corn reached Texarkana did the Hardin Company, the seller, acquire title thereto and control thereof, and that was after the first contract of transportation had been completed, and not until then did it acquire the means of filling its contract.

So, in the instant case, the purchaser acquired no title to nor control of the lumber until it had been inspected, accepted, and paid for, and all this after the first contract of transportation was fully completed.

Further discussion, however, we deem unnecessary. The pleas show that the contract was to be fully performed within this state, and we conclude that the replications were no answer to the pleas, and that the demurrer thereto should have been sustained.

The contract as modified by the parties, as shown by count 3, stipulated for delivery of the lumber, after October 15th, on demand of the plaintiff. While said count discloses that the original contract called for delivery by October 15th, the modified contract fixed no time therefor, but delivery was to be upon demand of plaintiff.

“When the time of delivery is at the option of the buyer, he must at least exercise his right within a reasonable time, and the seller is entitled to a reasonable time after notice to make delivery, but he cannot delay delivery beyond a reasonable time.”—35 Cyc. 182.

Count 3 alleges that demand for delivery was made “within a reasonable time,” but this is alleged as a conclusion of the pleader, and we are of opinion that the averment as to time when the demand was made should

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have been more specific to meet the requirements of good pleading.—*Central Lumber Co. v. McClure Lumber Co.*, 180 Ala. 606, 61 South. 821; *Continental Jewelry Co. v. Pugh Bros.*, 168 Ala. 295, 53 South. 324, Ann. Cas. 1912A, 657; *Carmelich v. Mims*, 88 Ala. 335, 6 South. 913; *Sloss-Sheffield Co. v. Sampson*, 158 Ala. 590, 48 South. 493; 31 Cyc. 105.

This count also fails to show that the defendant failed to make said delivery within a reasonable time, the averment being that he failed to make said delivery upon demand. It should be shown that such failure was within a reasonable time after such demand.—Authorities, *supra*; 35 Cyc. 182.

We conclude that the demurrer to the complaint was well taken.

The rulings of the trial court were not in accord with the conclusions we have here reached, and its judgment is therefore reversed and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and MAYFIELD, JJ., concur.

Nicholson v. Killpatrick.

Malicious Prosecution and False Imprisonment.

(Decided June 18, 1914. Rehearing denied July 25, 1914.
66 South. 8.)

1. *Bail; Right to; Arrest.*—Those who make bail for one accused of crime are not entitled to arrest him without a warrant except as prescribed by section 6351, Code 1907; the right there given being exclusive.

2. *Appeal and Error; Review; Presumption.*—Where the record did not disclose the demurrer filed, the overruling of the demurrer cannot be held erroneous although the plea to which it was directed was

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subject to demurrer on one ground; in the absence of the demurrer, the presumption will be indulged, to support the ruling of the trial court, that the demurrer was inapplicable.

3. *Charge of Court; Directing Verdict.*—Where issue is taken on an immaterial or improper plea, and the plea is proven without dispute, the pleader is entitled to the general charge; if, however, the evidence is conflicting as to matters alleged in the plea, the question is one for the jury.

4. *False Imprisonment; Arrest by Bail; Evidence.*—In an action for false imprisonment based on an unlawful arrest by plaintiff's bail, the bail bond is admissible in evidence in justification only where the right of the bail to make the arrest is properly pleaded; when not so pleaded, the bail bond is admissible only in mitigation.

APPEAL from Marshall Circuit Court.

Heard before Hon. W. W. HARALSON.

Action by Dave Nicholson against J. W. Killpatrick for malicious prosecution and false imprisonment. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The first count claims damages for maliciously arresting and imprisoning plaintiff for two days. Count 2 claims for causing same to be done. Count 4 claims for assault and battery. Plea 5 is as follows:

Plaintiff at the time of his arrest and imprisonment was charged with the commission of a felony in DeKalb county, Ala., and defendant and one John A. Miller had theretofore become bail to his appearance at the next term of the circuit court of said county to answer said charge, and at the time mentioned in the complaint defendant had good cause to believe that plaintiff was in the act of leaving, or preparing shortly to leave, the county so that defendant would become liable as bail for plaintiff, and defendant avers that he did nothing more than to detain plaintiff for the purpose of releasing himself from such liability as bail for plaintiff, and that he did not detain him any longer than was necessary for said purpose, and that, while being detained, plaintiff was in no manner neglected or mistreated.

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JOHN A. LUSK & SON, and A. E. HAWKINS, for appellant. The sureties on a bail bond have no right to arrest their principal without a certified copy of the bail bond.—§ 6351, Code 1907; *Gray v. Strickland*, 163 Ala. 344; 5 Cyc. 48. Defendant became a trespasser ab initio when he failed to complete his exoneration.—19 Cyc. 331. The unlawfully imprisoning of plaintiff is tantamount to an assault and battery, and would support an indictment.—*Long v. Rogers*, 17 Ala. 540; *Gray v. Strickland*, 163 Ala. 344.

MCCORD & ORR, for appellee. If issue is joined on an immaterial plea, and it is proven without conflict, the pleader is entitled to affirmative instruction.—*Rowe v. Arrington*, 1 Ala. App. 633; *L. & N. v. Mason*, 58 South. 963. The bailors are the jailors of their principal.—*State v. Crosby*, 22 South. 110. The remedy provided by statute is not exclusive in this case.—1 A. & E. Enc. of Law 270.

ANDERSON, C. J.—It may be that the bail of a defendant had the right to arrest him without process of any description under the common law; yet it is settled in this state that the only authority he has to arrest the defendant is under a certified copy of the bond as prescribed by section 6351 of the Code of 1907. This court in construing said statute held that the right there given was exclusive, and not cumulative (*Gray v. Strickland*, 163 Ala. 344, 50 South. 152), and we are not inclined to depart from said holding.

Special plea 5 was, therefore, subject to an apt ground of demurrer. We cannot, however, put the trial court in error for overruling a demurrer to this plea, as the record does not disclose the demurrer to said plea, and presumptively it, if interposed, was inapt, and the action of the trial court in overruling same must be sustained.

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It is a general rule that when issue is taken on an immaterial or improper plea and the said plea is proven without dispute the pleader is entitled to the general charge; but plea 5 was not proved beyond dispute, as it avers, among other things, that the defendant had cause to believe that the plaintiff was in the act or was preparing to abscond, and this was a question for the jury.

The trial court, therefore, erred in giving the general charge for the defendant as to count 4. It may be true that the only assault and battery shown was in arresting the plaintiff, but if the arrest was unlawful it was an assault and battery, and, as the defendant did not prove what he made a material averment of his plea 5, he was not entitled to the general charge as to count 4, and which was improperly given.

With plea 5 in, the trial court did not err in permitting the introduction of the bond, indictment, etc., in justification, but for the purpose of another trial if the issues are made under the *Gray case, supra*, these papers should be admitted solely for the purpose of mitigating the damages.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MCCLELLAN, SAYRE, and DE GRAFFENBRIED, JJ. concur.

[Briggs v. Birmingham Railway, Light & Power Company.]

Briggs v. Birmingham Railway, Light & Power Company.

Death Action.

(Decided June 30, 1914. Rehearing denied July 25, 1914.
66 South. 95.)

1. *Municipal Corporation; Ordinances; Presumption.*—An ordinance assuming to exercise a power within the granted powers of the municipality not void on its face is presumed to be reasonable and valid until the contrary is shown.

2. *Same; Reasonableness.*—Whether an ordinance of a municipality is unreasonable is a question to be determined by the court, and not for the jury.

3. *Same; Validity.*—The unreasonableness of an ordinance must be clearly shown before the courts will declare such ordinance void for unreasonableness.

4. *Negligence; Proximate Cause.*—A person guilty of negligence is responsible for all the consequences which a prudent, experienced man, acquainted with all the attendant circumstances, would have foreseen.

5. *Same.*—Unless the evidence clearly shows that the negligence of defendant was not the proximate cause of the injury complained of, that question is for the jury.

6. *Electricity; Regulation; Ordinances.*—Within its police powers a city may enact ordinances requiring the insulation of the metal portion of arc lights, provided they are reasonable regulations.

7. *Same; Injury; Action.*—Under the evidence in this case, it was a question for the jury whether the negligence of defendant in not insulating the exposed portion of its arc light as required by the ordinance was the proximate cause of the death of plaintiff's intestate.

8. *Same; Contributory Negligence.*—One using the streets of a city may assume that an electric light company has complied with the ordinance requiring the insulation of the exposed metal parts of arc lights, and hence, it was not contributory negligence in bringing a high metal engine into a place where it accidentally came in contact with an uninsulated arc light, through which a deadly current was passing.

(Mayfield, J., dissents.)

APPEAL from Birmingham City Court.

Heard before Hon. WILLIAM M. WALKER.

[Briggs v. Birmingham Railway, Light & Power Company.]

Irene Briggs, as administratrix of the estate of H. W. Briggs, deceased, brings her action against the Birmingham Railway, Light & Power Company, for damages for the death of her intestate, caused by a high electric current. Judgment for defendant and plaintiff appeals. Reversed and remanded.

ALLEN & BELL, for appellant. Electricity is highly dangerous, and care in the use thereof must be commensurate.—*B. R. L. & P. Co. v. Murphy*, 56 South. 817; *So. B. T. & T. Co. v. McTyer*, 137 Ala. 612. The duty to exercise a high degree of care exists in favor of all persons likely to be injured at a place where they had a right to be for pleasure or business.—25 L. R. A. 552; 16 L. R. A. 43; 107 Pac. 778. No excuse that the injury in its manner of occurrence could not be reasonably anticipated.—21 A. & E. Enc. of Law 488; 44 S. W. 257. It was immaterial that other causes for which defendant was not responsible may have contributed to the injury.—*McKay v. So. Bell*, 111 Ala. 237; *Enslen v. New Orleans*, 21 South. 153; 2 Elliott's Road & Streets, 821. The proximate cause of an injury by coming in contact with a wire in a street is the condition of the wire.—*Jones v. Finch*, 128 Ala. 217; 89 S. W. 865; 54 Pac. 960. The violation of a municipal ordinance is negligence.—*Aniston E. & G. Co. v. Ehwell*, 144 Ala. 317; *L. & N. v. Webb*, 90 Ala. 185; *A. G. S. v. Anderson*, 199. The ordinance introduced was valid.—31 L. R. A. 798; 170 U. S. 78; 107 N. Y. 593.

TILLMAN, BRADLEY & MORROW, for appellee. The sustaining of the demurrers to counts 3 and 4 was without injury.—*Frederick v. Coosa P. & F. Co.*, 59 South. 702; *L. & N. v. York*, 128 Ala. 305; *Jones v. Finch*, 128 Ala. 217. The 4th plea was not subject to the criticism aimed

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at it.—*Pace v. L. & N.*, 52 South. 52. The evidence fails to show any negligence on the part of defendant, and it is patent and undisputed that intestate was also negligent.—34 S. E. 885; 69 Atl. 282; 70 Atl. 874; 92 Pac. 62; 102 N. W. 89. The evidence introduced did not attempt to construe the ordinance, but simply to explain what the terms in the ordinance meant in the electrical engineering work.—*A. G. S. v. Roach*, 110 Ala. 266.

MCCLELLAN, J.—Appellant's intestate, Herbert W. Briggs, was killed January 20, 1911, by electricity, under circumstances to be stated. The action is for damages for his wrongful death.

Intestate was, when killed in the employment and service of the Southern Bitulithic Company, which was then engaged in performing its contract with the city of Birmingham to pave the intersection of Twenty-first street and Avenue G, public thoroughfares in that city. Intestate's duty, which he was performing when stricken, was as engineer of a concrete mixer. This machine was so constructed as to allow its movement in or over a street by means of its own engine power. The engineer's proper place when the machine was moving was on the ground beside it with his hand on the steering wheel, which wheel was designed to control, in a limited sphere, the direction of the machine. He was so related to the machine at the time he was killed.

Above the center of intersection of the thoroughfares mentioned a street arc light was swung from a cable extending from opposite corners of the square of intersection. This light was put there, maintained, and operated by the light and power company (appellee) under a contract with the city of Birmingham. The frame for the light cleared the street surface by a fraction over 13 feet. The machine (its "gooseneck") of the paving com-

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pany rose a fraction over 14 feet from its plank way (laid by hand ahead of it on the surface of the street). It was determined by the superior (to the engineer) representative of the paving company to move the machine to another part of the space in the intersection of these streets, beyond, generally (from the point where the machine was at rest), the point in the intersection above which the light frame was hanging. The engineer was ordered to move the machine, plank was laid as indicated, and an employee of the paving company, equipped with a stick or piece of scantling for the purpose, was placed on the "gooseneck" of the machine to shunt and hold aside, for the passage of the machine, the light's frame immediately toward which the machine's direction was charted. The employee put the piece of wood against some part of the light frame and pushed it clear of the sweep of the machine's top section, but the wood slipped off the frame of the light, the light swung back to its perpendicular, and the metal rim or metal shade of the frame came in contact with the hoisting wire or chain on the machine, through which the deadly electrical current passed to other metal parts of the machine, and thence into the hand (at the steering wheel) and body of Briggs, instantly killing him. These circumstances were not the subjects of dispute in the evidence.

Section 54, p. 176, of the Code of the City of Birmingham, as revised by Mr. Weakley, was admitted in evidence, and is as follows: "Arc Lamps. (a) Must be provided with reliable stops to prevent carbons from falling out in case the clamps become loose. (b) All exposed parts must be carefully insulated from the circuit. (c) Must, for constant-current systems, be provided with an approved hand switch that will shunt the current around the carbons, should they fail to feed properly."

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This ordinance was in force at the time of Briggs' death.

The trial court gave the general affirmative charge for the defendant, at its request.

Where an ordinance or by-law, assuming to exercise a power within the municipality's competency, is not void on its face, the legal presumption is that the ordinance or by-law is reasonable and valid until the contrary is shown by proper evidence.—*Bryan v. Mayor, etc.*, 154 Ala. 447, 452, 45 South. 922, 129 Am. St. Rep. 63; *Marion v. Chandler*, 6 Ala. 899, 902; *Johnson v. Town of Fayette*, 148 Ala. 497, 42 South. 621. When the unreasonableness vel non of an ordinance or by-law is asserted or urged, the question thus made is to be decided by the court, not the jury.—*Marion v. Chandler, supra*; *Johnson v. Town of Fayette, supra*; 2 McQuillin on Munc. Corp. § 729; 2 Dillon, § 599; *Evison v. Chicago R. R. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434. A qualification of this doctrine appears to have commended itself to the Supreme Court in *A. & W. Tel. Co. v. Philadelphia*, 190 U. S. 160, 166, 23 Sup. Ct. 817, 47 L. Ed. 995; but the conclusion, in this respect, of our cases, as well as the texts cited above, seem to us to afford the sounder, more practical rule, and will be adhered to. The court having the question to determine will take relevant evidence to advise its judgment upon the issue of unreasonableness vel non.—2 Dillon, § 599; *Marion v. Chandler, supra*; *Van Hook v. Selma*, 70 Ala. 361, 365, 45 Am. Rep. 85; 2 McQuillin, § 729. In order to justify the court in annulling an ordinance or by-law on the ground that it is unreasonable it must be "demonstrably shown" that it is unreasonable; "equipoise of opinion" on the matter will not warrant the setting aside of the ordinance or by-law on the ground of unreasonableness.—*Marion v. Chandler*, 6 Ala. 899, 902.

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The manifest object of the subdivision (b) of the ordinance quoted before is to assure safety from the highly dangerous effect of electricity. The abstract power of the municipality to ordain in respect of care and safety as the quoted subdivision undertakes is not denied. Indeed, the power sought to be asserted thereby is of police, and the obvious purposes thereof forbid doubt of the municipal competency to so ordain, if the effort made does not bring the subdivision under the rule which requires the annulment of ordinances that are unreasonable.

It is clear from the terms of the subdivision (b) of the ordinance that all exposed parts of arc lamps should be insulated; and that "from the circuit." Upon testimony of qualified experts it is insisted for appellee that, if that provision of the subdivision should be accepted as requiring insulation from any voltage that might be upon the wires carrying no current to an arc lamp, the result would be to exact the impossible; and hence the subdivision would be unreasonable and void. So from this premise it is urged that the subdivision should be interpreted as requiring insulation from the potential; that is, as we understand the testimony for defendant, an insulation that would suffice to "isolate" that degree of voltage required to operate the individual arc lamp of the series of arc lamps of which the arc lamp in question was a member. The arc lamp in question was of a series of 60 arc lamps employed in street lighting; and the voltage necessary to the use of the individual arc lamp was approximately 72 volts. The wires connecting the series were charged with a voltage equal to the multiple of the number of lamps in the series (60) and the voltage (72) required to operate each arc lamp of the series. This placed upon the wires a current of approximately 4,400 volts. The testimony is in conflict upon

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the issue of the feasibility or practicability vel non of an insulation adequate and effective to confine that maximum voltage so as to isolate it from the exposed parts of the arc lamps of the series. The evidence on this issue has been carefully considered by the full bench. The court is of the opinion that the evidence is not sufficiently conclusive, under the rule before stated, to justify the court in affirming the defendant's premise that subdivision (b) of the ordinance was or is unreasonable in exacting insulation to isolate the current—not merely the potential—from the exposed parts of the arc lamps of the series to which the lamp in question belonged. The court, therefore, holds that the subdivision (b) under consideration required the insulation of exposed parts of arc lamps "from the circuit." This exaction of the subdivision was shown, by tendencies of the evidence at least, to have been violated; and, if violated, to have sustained the plaintiff's assertion of negligence on the part of the defendant.

Treating the appeal broadly, as, indeed, general affirmative charge given for defendant renders necessary, we are brought to the consideration of the inquiry whether intestate's death may be attributed for its legal, proximate cause to the negligence stated.

On the original review of the trial the view prevailed, and an opinion to that effect was delivered, that the tragic result and the circumstances leading to it were not so within the range of fairly and reasonably anticipatable events as to allow the visitation upon the defendant, for its assumed negligence in not observing the requirements of subdivision (b) of the ordinance, of responsibility for intestate's death.

Upon rehearing the full bench has carefully reviewed that conclusion; and the court, with the exception of our Brother MAYFIELD, are satisfied that error underlay the pronouncement previously made.

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The accepted, established statement of the particular phase of the legal definition of proximate cause with which this appeal concerns us is thus set down in *Armstrong v. Montgomery Ry. Co.*, 123 Ala. 233, 249, 250, 26 South. 349, 354: "The logical rule in this connection, the rule of common sense and human experience as well (if indeed, there can be a difference between a logical doctrine and one of common sense and experience, as some authorities appear to hold), is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which, in fact, existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

This statement is, in the main, the substance of the text to be found in 1 Sher. & Red. on Neg. § 29. It has been said by this court to accord with the pertinent affirmation of principle made in *Mutch's Case*, 97 Ala. 194, 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179. The quoted announcement has been reaffirmed in these, among other, subsequent deliverances on the subject: *M. & O. R. R. Co. v. Christian Moerlein Brew. Co.*, 146 Ala. 404, 41 South. 17; *L. & N. R. R. Co. v. Quick*, 125 Ala. 553, 28 South. 14; *K. C., M. & B. R. R. Co. v. Foster*, 134 Ala. 244, 32 South. 773, Am. St. Rep. 25.

Unless the evidence bearing upon the question whether the defendant's negligence was the proximate cause of the injury complained of is entirely free from doubt or adverse influence, that question must be submitted to the jury for decision, under proper instructions by the court. —1 Sher. & Red, on Neg. § 55; 1 Cooley on Torts, p. 111; *Henry v. St. Louis Ry. Co.*, 76 Mo. 288, 43 Am. Rep. 762; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 48 Am. Rep. 622;

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Milwaukee R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; *E. T., V. & G. R. R. Co. v. Lockhart*, 79 Ala. 315; *A. G. S. R. R. Co. v. Arnold*, 80 Ala. 600, 605-606, 2 South. 337.

Whether the "consequences," upon which the claim for recovery is made, as for the negligence shown in the concrete case presented, were those "a prudent and experienced man, fully acquainted with all the circumstances, at the time of the negligent act, would have thought reasonably possible to follow, if they had occurred to his mind," is ordinarily, a question for the jury to determine in view of the accompanying circumstances.—*Ehrgott v. Mayor, etc., supra*; *Milwaukee R. Co. v. Kellogg, supra*. But where the damnifying result for which the plaintiff would be compensated or have penalized was beyond the range of any reasonable expectation of a reasonably prudent one assumed to have had the fullest knowledge of the circumstances, the court itself may pronounce against the defendant's liability.—1 Sher. & Red. on Neg. § 28. It should, however, be constantly borne in mind that there is no requirement, as a condition to liability, that the defendant, or those for whose negligence the defendant is responsible, should have anticipated the actual consequences that did, in fact, ensue.

In the opinion of Chief Justice ANDERSON, Justices SOMERVILLE, GARDNER, and the writer, casting the conclusion of the court, the necessary result from the application of the principles stated before is: That the material inquiry whether the death of Briggs, under the circumstances shown by the evidence, was within the reasonably anticipatable consequences of the negligence committed by this defendant in failing to observe the mandate of subdivision (b) of the quoted ordinance should have been submitted to the jury for determination, under appropriate instructions from the court. Jus-

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tices SAYRE and DE GRAFFENRIED are of the opinion that the death of Briggs was, as a matter of law, the proximate consequence of the negligence mentioned just above. Justice MAYFIELD is of the opinion that the death of Briggs was without the range of any rationally possible consequence of the negligence described, and hence that that negligence was not the proximate cause of Briggs death.

The court therefore erred in giving the affirmative charge for defendant.

Since Briggs, as well as his superiors in the paving company's service, had the right to assume, until advised to the contrary, that the rim of the arc lamp was not charged with electricity, that the current was insulated as subdivision (b) of the ordinance required, no contributory negligence or assumption of risk could be attributed to Briggs. The general doctrine is that every one may be presumed to act with due care and to observe the mandates of the law, including ordinances, and that there is no duty on one to anticipate another's culpable negligence.—1 Sher. & Red. on Neg. § 92; 29 Cyc. pp. 516, 517.

The judgment is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur in the opinion. SAYRE and DE GRAFFENRIED, JJ., concur in the conclusion as indicated in the opinion. MAYFIELD, J., dissents.

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Libel.

(Decided May 22, 1913. Rehearing denied June 30, 1914.
66 South. 16.)

1. *Appeal and Error; Harmless Error; Pleading.*—The elimination by plaintiff of counts of the complaint rendered harmless to defendant any errors committed in rulings as to such counts.

2. *Limitation of Action; Pleading; Amendment.*—An amendment to the complaint setting up a republication of the libelous action by other newspapers, and charging that they were induced or caused by defendant, states a different cause of action, and being filed more than a year after the publication, was expressly barred by section 4840, Code 1907.

3. *Libel and Slander; Pleading; Amendment.*—It was competent for plaintiff to amend his complaint so as to allege his business or profession by way of inducement.

4. *Same; Colloquium.*—Where the words set out in the complaint for libel are not actionable per se, the complaint must allege facts to show the sense in which the language was used, etc.

5. *Same.*—Matters of inducement or colloquium averred by way of introduction must be facts, and not mere statements, arguments or conclusions, showing that the words in question are actionable.

6. *Same; Innuendo.*—In an action for libel the office of the innuendo is to explain the subject matter, and if the language averred to have been used does not itself constitute a libel, no words contained in the innuendo can make it actionable.

7. *Same.*—In a complaint for libel, an innuendo means the same as "id est," "scilicet," or "aforesaid," being merely explanatory of the subject matter sufficiently expressed before.

8. *Same.*—In an action for libel, facts alleged as inducements or colloquia are traversable, and must be proven, while the innuendo is not traversable, and hence, need not be proven.

9. *Same; Complaint; Words Actionable.*—The complaint examined and held to state a cause of action.

10. *Same; By Others.*—Every repetition of a slander, or the publication thereof by a newspaper is a republication, rendering each person so repeating or republishing liable, as well as the initial one.

11. *Same.*—The initial slanderer or libeller is not responsible in an action of slander or libel, for such repetitions and republications of the slander and libel.

12. *Same.*—It was error to instruct the jury that under the law of Alabama, this defendant is responsible for the publication of any

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libel which may result in actionable injury, as such instruction authorizes a recovery for publication made by other newspapers.

13. *Same; Evidence.*—Evidence that the alleged libelous article was republished by other newspapers, was not admissible, nor was it rendered so because the reporter who reported for defendant also reported for the other papers.

14. *Same.*—A repetition by a defendant of the libelous word is admissible as evidence of malice, and in aggravation of damages.

15. *Same; Instructions.*—Where there were special pleas alleging that the matter was privileged, and there was evidence to support them, it was error to instruct the jury to find for plaintiff if the jury were reasonably satisfied that plaintiff had been injured in the manner averred in the complaint.

Appeal from Jefferson Circuit Court.

Heard before Hon. E. C. Crowe.

Action by John B. Waterman against the Age-Herald Publishing Company for libel. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 2 is as follows:

Plaintiff claims of defendant the sum of \$30,000 damages for false and maliciously publishing of and concerning plaintiff in a newspaper published in Birmingham, Jefferson county, Ala., called the Birmingham Age-Herald, on, to wit, the 28th day of May, 1910, with intent to defame plaintiff, a statement in substance as hereinafter set out, the same having reference to the bankruptcy and failure of a partnership known as Knight, Yancey & Co., which was alleged to have issued and disposed of a vast amount of spurious and fraudulent bills of lading, said publication being in part as follows: "In answer to a question as to whether Mr. Knight implicated others in the criminal knowledge relative to false bills of lading, the witness said: 'Knight intimated to me that others knew of the fake bills of lading. His intimations were not sufficiently distinct for me to even hazard a guess as to whom he referred. I then told him to shut up as I did not care to hear any more about it. I simply wished to know how bad we

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were stuck and then get remedies, to which the creditors were justly entitled.' Mr. Nesbitt was closely questioned by Mr. Benners in regard to a loan of \$5,000 which was made to a Mr. Waterman, agent for a Mobile steamship line. It developed that the general belief is that Waterman is abroad and does not intend to return. Mr. Nesbitt said he knew Waterman, and did not know a loan was made by him to Knight, Yancey & Co. Mr. Nesbitt, however, qualified his statement by adding that he presumed that it was simply a personal act between Mr. Knight and Mr. Waterman. 'Did Mr. Knight mention this loan to you?' was the question asked by Mr. Benners. 'He did,' said Mr. Nesbitt. 'He also told me that the mention of the loan publicly would reflect upon Mr. Waterman.' 'What did he mean by the reflection?' 'I do not know,' answered the witness. The information was disclosed that several large shipments of cotton had been made by the way of the line represented by Waterman. It is also brought to light that several spurious bills of lading are held upon which cotton was supposed to have been routed via the lines represented by Waterman."

Addenda to Count 2.—And plaintiff avers that at the time of said publication and for many years prior thereto, plaintiff's business was, and has been that of freight and shipping agent, contractor or representative in Mobile, Alabama; and that plaintiff then resided in Mobile, intending to continue his business at that point; and that at the time of said publication plaintiff had well nigh concluded the organization of a shipping company with excellent connection for the handling of cotton, and with headquarters in Mobile, Alabama; that the failure of Knight, Yancey & Co., one of the largest Southern cotton concerns, under circumstances which were alleged to have disclosed fraud in the matter of false or fraudulent bills of lading, occasioned intense interest and feel-

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ing in the cotton trade in America and abroad, and aroused general resentment and indignation towards those who might be considered responsible or connected with the alleged irregularity; and plaintiff avers that the publication of and concerning plaintiff herein complained of in direct connection with said fraudulent transaction and having reference to plaintiff's business, his finances and intentions to abandon his residence, and place of business in Mobile, Alabama, and published during the investigation of said failure (the Knight and Nesbitt referred to in said publication being members of the said firm of Knight, Yancey & Co.,) conveyed the false meaning and question that plaintiff was dishonorably connected with said fraudulent practices, or was a fugitive or had abandoned his domicile, or had absented himself by reason of the matters published, and thereby directly and proximately cast suspicion upon plaintiff on the part of the cotton trade, brought him into public contempt, and injured plaintiff in his said business and calling, and in his reputation, credit and good name, and caused him to suffer great mental pain, anguish and mortification, etc.

Plaintiff avers that the statements, insinuations, and implications contained in said article meaning and implying, among other things, that plaintiff was fugitive, or had concealed or absented himself by reason of the matters referred to in said statement, or was evading a responsibility, debt, or obligation, or had dishonorable connection with said Knight, Yancey & Co., were false, malicious, and libelous; and plaintiff avers that said items published as aforesaid were given large circulation by defendant throughout the state of Alabama and elsewhere, and as a proximate consequence thereof plaintiff was injured in his good name and in his business of shipping agent and reputation, and was caused

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to suffer mental pain and anguish, and was caused to be deprived of the opportunity of completing profitable and honorable business connections with the organization of a Mobile steamship company at a handsome salary, and with a reasonable prospect of realizing large returns.

NATHAN L. MILLER, and NEEDHAM A. GRAHAM, JR., for appellant. The depositions were taken without reasonable notice, some without notice at all to the defendant, and should have been suppressed.—§ 4032, Code 1917; Acts 1911, p. 487; *Montgomery St. Ry. v. Mason*, 133 Ala. 508. The court erred in allowing plaintiff to amend its complaint by the addition of counts 2, 3 and 4, the two latter counts being based on a republication of the alleged libel by other newspapers.—25 Cyc. 506; Newell, Slander & Libel, 350; *Hereford v. Coombs*, 126 Ala. 369; 154 Mass. 238. They were also a departure from the original cause of action.—*Ivey Coal Co., v. Long*, 139 Ala. 563; *Ala. C. C. Co. v. Watson*, 158 Ala. 166. They were also barred by the statute of limitations for one year.—§ 4840, Code 1907, and authorities cited; 25 Cyc. 471. The office of an innuendo is to select and apply to ambiguous words the sense in which they were used and understood, but not to enlarge the meaning of the words beyond their natural sense.—*Gaither v. Advertiser Co.*, 102 Ala. 458; *Labor Rev. Pub. Co. v. Galliker*, 153 Ala. 164; *Henderson v. Hale*, Ala. 19 Ala. 154; *Trimble v. Anderson*, 79 Ala. 515. The words complained of were not reasonably and fairly susceptible of the meaning ascribed by plaintiff, or of any such meaning.—Authorities supra, and *Henry v. Dozier*, 161 Ala. 292; Collien on Bankruptcy, 189, 315. Neither are the words described in count 2 libellous per se, and in the absense of special damages they impose no liability. Defendant can only be held liable for damages occasioned by its

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own publication, and it was error to admit evidence tending to prove that such publication was copied and republished in other papers.—Authorities *supra*.

CAMPBELL & JOHNSON, for appellee. The only count submitted to the jury was the second count, and no error can be predicated as to rulings on the counts which were withdrawn by plaintiff.—214 U. S. 185. This authority and the authorities therein cited settle adversely to appellant's contention all matters insisted upon on the merits of the case. There was no error in refusing to strike interrogatories.—*Wisdom v. Reeves*, 110 Ala. 418; *Nat. F. Co. v. Holland*, 107 Ala. 412.

MAYFIELD, J.—The action is libel. The libel alleged was the publication of what purported to be a report of the proceedings had in a bankruptcy court, before a referee in bankruptcy, in the matter of Knight, Yancey & Co., engaged in the business of buying and selling cotton. The bankrupt was supposed to have issued and disposed of a vast amount of spurious and fraudulent bills of lading.

The plaintiff was not a member of the partnership of Knight, Yancey & Co., but only had dealings with it in the cotton business, and seems to have been on friendly relations with some members of the firm.

The reporter will set out count 2 of the complaint, which contains the alleged libelous publication in *hæc verba*; such publication being made to appear to be a part of the newspaper report of the proceedings in the bankrupt court.

There were quite a number of counts added to the complaint by amendment, one of which was count 2, ordered to be set out, on which alone the case was submitted to the jury. The other counts were all eliminated by re-

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quest of plaintiff, which elimination, of course, could work no injury to the defendant, and rendered perfectly harmless any possible errors committed in rulings as to the eliminated counts, but not necessarily such as inhered in rulings as to the admission of evidence as will be hereafter shown.

All counts related to publication of the same matter or parts of the reports of the proceedings in the bankrupt court, but some of these counts set up a different publication of this matter—that is, a subsequent publication of the same matter in other newspapers than that of the defendant, to wit, the *Memphis Commercial-Appeal*, a newspaper published in Memphis, Tenn.—with appropriate allegations that these publications were induced or caused by the defendant. Some of these counts were added more than a year after the publication, and as to such counts the defendant interposed the plea of the statute of limitations of one year.

Actions of libel and slander are in terms, by our statute (Code, § 4840), limited to one year. So the question is: Did these amended counts, filed after a year, state a new and different cause of action, or the same cause of action, but in language varying from that stated in the original complaint, which was filed within a year? If they stated a different cause of action, such action was barred when the amendment was filed; if the same cause of action, in varying language, then it was not barred.

The rule is thus stated in *Cyc.* (volume 25, p. 436) : “Every distinct publication of libelous or slanderous matter gives rise to a separate cause of action, although several causes of action for different libels or slanders may be united in the same action. But it has been held that slanderous words spoken at one time constitute one cause of action, and the same or other slanderous words spoken at other times constitute other causes of action,

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and if relied upon they should be separately pleaded in separate counts or paragraphs."

Mr. Newell (Def. Lib. & Slan. p. 350) states the rule as follows: "It is well settled that every utterance of slanderous words is a distinct cause of action, and, if recovery is sought for repeating a slander, the repetition must be declared upon as a separate cause of action. The mere general allegation of the repetition of the slander is but pleading evidence which is admissible without pleading, for under a single count the plaintiff may show repetitions, not for the purpose of sustaining the action, but for the purpose of showing malice in the speaking of the words declared upon, thereby aggravating the damages. And where the alleged cause of action is barred by the statute of limitations, it cannot be claimed by the plaintiff that, because the alleged defamatory words were repeated at various times up to the commencement of the suit, the statute of limitations has no application."

It would therefore seem that these counts, setting up republications in other papers, stated different causes of action from that contained in the original complaint; and, if filed more than a year after the publication, they were barred, and the plea of the statute of limitations of one year, as to such counts, was good. We say this for the benefit of the the trial court, and of the parties, in the event there is a new trial, as these counts were eliminated before the case was submitted to the jury.

There are a number of questions raised and discussed in briefs as to the sufficiency of the matters of colloquium, inducements, and innuendoes. The rules touching these have been often stated by this court and others, and by text-writers, and there is very little difference in the statements as to the necessity and sufficiency of such averments in action of libel and slander.

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In actions for libel, it is often proper and sometimes necessary to allege, by way of inducement, the trade, profession, or business in which plaintiff was engaged at the time of the publication, and that he was so engaged at that time. Such allegations are called matters of inducement, and are proper and sometimes necessary to show that the matter alleged was libelous, and to support damages for injuries on account of such trade, profession, or business. This was a proper case for such allegations, and the trial court did not err in allowing amendments to the complaint, which added such matters of inducement.

Complaints or declarations must contain allegations to show that the words published or spoken were so published or spoken in reference to and concerning the plaintiff, and of and concerning distinct and independent facts, which show that the words were used, on the occasion alleged, in a particular sense, such as would render them actionable, although they might not be actionable if otherwise used. The law proceeds upon the theory that what is the ordinary meaning and nature and force of language is a question of law. And when the language or words used are set forth, the first question is whether or not the language, standing alone, imputes such a crime or offense as to be actionable per se. If the language is not per se actionable, then facts, as inducements and colloquia, must be alleged to show the sense in which the language was used, that it applied to the plaintiff, and that, as so applied, it is actionable by him. If the meaning and sense of the language is clearly actionable, the mere charge that it was used of and concerning the plaintiff is sufficient to state a cause of action; and the same is true if the language itself shows that it was used, and that it would naturally injure the plaintiff. If the language is am-

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biguous in meaning or sense, and of and concerning whom and what it is so used, then the office of the colloquium is to make it certain as to these matters, and to show that, as used, it was actionable at the suit of the plaintiff.

Whatever circumstances are necessary to constitute the crime or offense imputed, or to show that the language used was actionable, must be alleged. If the words used are actionable per se, the matter of colloquium may tend to aggravate; but it is not necessary to state a good cause of action. Hence such matter may be proper when it is not necessary; but it is often necessary to the statement of a good cause of action.

As to matter of inducement and colloquium, the averments must be of facts and circumstances which, by way of introduction, show the words in question to be actionable, and not of mere statements arguments, conclusions, and inferences.

Matters of explanation are not treated strictly as averments of facts, but as more explanations of what was meant by the averments. This explanation, in complaints for libel and slander, is called the innuendo, which means the same as "id est," "scilicet," or "afore-said." Its only office is to explain the subject-matter, which must have been sufficiently averred before, as such one, meaning the plaintiff, or such a subject, meaning the subject in question. If the matters going before the innuendo do not constitute libel or slander, no words contained in the innuendo can make the language used actionable, for it is not the nature or purpose of an innuendo to state the cause of action.

The matters constituting the inducement and the colloquium are traversable and must be proven; the innuendo is not traversable, and hence need not be proven. Verdicts are set aside, and judgments arrested, in libel and slander suits, for the reason that the pleader at-

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tempted to make an innuendo serve as traversable matter in stating the cause of action, when it is at best merely explanatory of the traversable matter, the mere opinion of the pleader as to what it means.—*Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Carter v. Andrews*, 16 Pick. (Mass.) 1.

In the first of the above cases, it is said in the opening sentence of the opinion: "It is with great regret, and not without much labor and research to avoid this result, that we are obliged to arrest the judgment in this case for want of a sufficient count to support the verdict."

Later on in the opinion the court says: "With respect to the manner of putting upon the record those facts and circumstances which tend to render the words actionable, * * * it must be by averments in opposition to argument and inference, by way of introduction if it is new matter, and by way of innuendo if it is only matter of explanation, for an innuendo means nothing more than the words 'id est,' 'scilicet,' or 'meaning,' or 'aforesaid,' as explanatory of a subject-matter sufficiently expressed before, as such a one, *meaning* the defendant, or such a subject, *meaning* the subject in question."

The opinion then quotes from *Barham's Case*, in Coke, which is cited in all the books in illustration of this doctrine: "*He has burnt my barn, meaning a barn full of corn,*" adding, "This is bad, because what comes in under the innuendo is an addition to, and not an explanation of, the words spoken."

In 16 Pick. (Mass.) 4, Chief Justice Shaw said: "If the words did in fact mean what it is thus intimated by way of innuendo that they did mean, they would be abundantly sufficient to support the action. But after the numerous discussions and decisions upon that subject, it is in vain now to contend that it is a good mode

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of declaring to say that such words are used with such a meaning and leave it as an open question to the jury to determine upon the facts and circumstances whether the language was used with such a meaning or not. The case of *Bloss v. Tobey*, 2 Pick. (Mass.) 320, states the principle and the grounds on which it rests so fully that it cannot be necessary to repeat it. The rule is founded upon that important general principle that a plaintiff, to entitle himself to a judgment, must lay his case in such a mode as to enable the court to see, after verdict, that he has a good cause of action."

In illustrating the nature and necessity of a proper colloquium, when the words are not actionable per se, this same learned justice says: "The law will not shut its eyes to what the rest of the world can see and let the slanderer disguise his language and wrap up his meaning in ambiguous givings out, as he will; it shall not avail him; because courts will understand language in whatever form it is used, as all mankind understands it. This is a correct rule and must be regarded as a most sound and salutary one, to be acted upon by the court, and to be fully explained and enforced upon the trial of the facts before a jury. So language may be used ambiguously, or ironically, or technically, or conventionally. What are called cant terms and flash language are of the latter sort, where, among a particular class of persons, or by usage or convention, words are used in a particular sense. But, wherever this is a fact, it is in consequence of the existence of some usage or agreement, of some report in circulation, of the time, place, or manner in which the conversation was held, in short, of some fact capable of being averred in a traversable form, so that it may be put in issue and proved or disproved. If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of

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some extraneous fact, the plaintiff must undertake to prove that fact, and the defendant must be at liberty to disprove it. The fact then must be averred in a traversable form, with a proper colloquium."

This court, speaking through STONE, C. J., (*Gaither v. Advertiser Co.*, 102 Ala. 462, 14 South. 789), said:

" 'An innuendo may not introduce new matter, or enlarge the natural meaning of words. It must not put upon the defendant's words a construction which they will not bear. It cannot alter or extend the sense of the words, or make that certain which is in fact uncertain. * * * An innuendo cannot be proved. And it is for the judge to decide whether a publication is capable of the meaning ascribed to it by innuendo, and for the jury to decide whether such meaning is truly ascribed to it.'—13 Amer. & Eng. Encyc. of Law, 465-467. In other words, the court determines whether the words used are susceptible of the meaning sought to be given to them by the innuendo. If this inquiry is decided by the court against the contention of the pleader, this puts an end to it, for it is not permissible to make proof that the words employed were uttered in the sense or with the meaning imputed to them in the innuendo. That is not the subject of proof. If it be decided by the court that the words are susceptible of the meaning the innuendo seeks to ascribe to them, then it becomes a question for the jury to determine, under all the circumstances, whether they were intended to mean what the innuendo avers they did."

Count 2 of the complaint as amended, tested by these rules, is a good count; that is, it will support a verdict, was not shown to be bad by demurrer; but the original count is subject to the criticism that matter is stated in the innuendo which should have been stated as an inducement and colloquium, so as to make it traversable, and not merely explanatory.

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As before stated, the trial court properly allowed the amendments alleging the plaintiff's trade, business, or profession, and matters of inquiry thereto. What was said in *Ware v. Clowney*, 24 Ala. 707, 710, is apt here, and we repeat it: " 'Words are actionable which directly tend to the prejudice of any one in his office, profession, trade, or business in any lawful employment by which he may gain his livelihood.' "

"The authorities generally concur in upholding this action in three classes of cases which injuriously reflect upon the trade, profession, or business of an individual, namely: First, when the words charge the person with a want of fidelity in his trade or profession generally; second, where they charge such person with dishonesty, corruption, or want of integrity in a particular case; and, third, where the words impute ignorance or want of skill and capacity in general terms.—[*Foot v. Brown*] 8 John. (N. Y.) 66."

The rule as to the nature and sufficiency of statements as to special damages, as distinguished from those that are general, is well stated by Mr. Newell, in his work on Defamation, Slander & Libel, p. 634. It is there said: "Special damages are such as in fact have actually occurred as the result or consequence of the injury complained of, and not implied by law. They are either superadded to general damages arising from the act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arises from an act indifferent, and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing.

"Special damages must always be the legal and natural consequence arising from the defamation itself, and not a mere wrongful act of a third person. Whenever

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special damages are claimed, in order to prevent a surprise on the defendant, which might otherwise ensue at the trial, the law requires the plaintiff to state the particular damage which he has sustained, or he will not be permitted to give evidence of it at the trial."

The majority of the court hold that defendant's motion to suppress the depositions of the witnesses named therein, as shown on page 53 of the transcript, was properly overruled. The writer, however, dissents as to this proposition. The depositions were taken on interrogatories filed by the plaintiff on April 13, 1911, and cross-interrogatories filed by the defendant within ten days thereafter, and were taken on April 27th, 28th, and 29th. The defendant demanded notice of the time and place of taking such depositions, as is authorized by statute (Code, § 4032, as amended by the act of April 18, 1911 [Acts, pp. 487-489]). The majority are of the opinion that the record fails to show that this statute was of force at the date in question so as to be applicable to this case, and that if the statute applied, it was complied with as to notice.

Taking testimony in courts of law by deposition was not common, if known to law courts at common law, and hence statutes upon the subject must be strictly construed; and he who would avail himself of the benefits conferred by the statute must pursue the statute, at least in a substantial manner. The common law, in such courts, allowed the party to cross-examine the witness face to face, and in the presence of the jury. The statute authorizes the taking of testimony in the cases mentioned in the statute in the absence of the jury, but preserves the right of the adverse party to be present at the taking of the testimony, and to cross-examine the witness. In order that this may be preserved, the statute provides for notice to issue to the adverse party, or

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to his attorney, of the place and the time for the taking of the testimony. This is to the end that, if such adverse party so desires, he or his counsel may be present and face the witness at the taking of such testimony.

As to whether the depositions should have been taken jointly or severally by the commissioners named in the commission was a question which the defendant probably waived by not objecting within proper time. The commission was issued to Smith and Thomas, "or to such one or more of you as shall act herein." No objection was taken to this commission on the filing of cross-interrogatories, nor until after the depositions were taken.

It was error to allow plaintiff to prove, by various witnesses, that after the alleged publication by defendant these witnesses had read other similar publications in other newspapers, and had heard parties discuss the connection of plaintiff with the failure of Knight, Yancey & Co. Such testimony was *prima facie* incompetent and irrelevant, and nothing appears in this record to show that it was competent or relevant. It was, of course, competent to prove the publication by the defendant, and the wide circulation which the defendant gave the alleged libel; but is was not competent to prove that other third parties repeated it or republished it in other newspapers, and thereby increased the curculation and aggravated the damages.

In actions of libel or slander, the plaintiff cannot prove that he sustained special damages, by means of repetitions, by third persons of the same or similar words uttered by the defendant. The defendant was not shown to be responsible or liable for the facts of such third parties repeating, or of such other newspapers in republishing, the alleged libel. If the defendant is liable, such third parties are also liable; but they are not

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sued in this complaint. The mere fact that the same reporter who reported to the defendant company also reported it to other papers did not make such evidence admissible on this trial.

A case somewhat similar to this is that of *Bathrick v. Detroit Post & Tribune Co.*, 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63. In that case it appears that the plaintiff offered to prove the publication of the matter in other papers; and the court, speaking through Cooley, J., said: Mr. Brown, the local correspondent at Battle Creek, who had furnished the article complained of for defendant's paper, was called by the plaintiff to prove that he also furnished the articles for the Chicago papers. This was objected to, but the evidence received. The tendency was to suggest to the jury that the defendant was in some manner responsible for the Chicago publications. But this was an error. Brown was in no sense the general representative of any one of the papers, and neither of them was in any respect responsible for what he might do, except in so far as it might adopt his articles and make them its own by publishing them. Neither of them had any more concern with what Brown might do with or for the others than if it were done by any third person."

The question has been several times before the Supreme Court of Massachusetts, and such evidence has always been held not admissible. In the case of *Hastings v. Stetson*. 126 Mass. 329, 30 Am. Rep. 683, it was said, through Gray, C. J.: "It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no contro, and who thereby make themselves liable to the

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person slandered, and that such repetition cannot be considered in law a necessary, natural, or probable consequence of the original slander."

These decisions date back to the English case of *Ward v. Weeks*, 4 Moore & Payne, 796; s. c., 7 Bing. 211.

The Supreme Court of New York has so decided the question in the case of *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420. That court, speaking by Strong, J., said: "The words spoken by the defendant not being actionable of themselves, it was necessary in order to maintain the action to prove that they occasioned special damages to the plaintiff. The special damages must have been the natural, immediate, and legal consequence of the words.—Stark. on Sland. by Wend. (2d Ed.) 203; 2 Id. 62, 64; *Beach v. Ranney*, 2 Hill (N. Y.) 309; *Crain v. Petrie*, 6 Hill (N. Y.) 522 [41 Am. Dec. 765]; *Kendall v. Stone*, 5 N. Y. 14. Where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken sustains damages, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition; and the party who repeats them is alone liable for the damages.—*Ward v. Weeks*, 7 Bing. 211; *Hastings v. Palmer*, 20 Wend. (N. Y.) 225; *Keenholts v. Becker*, 3 Denio (N. Y.) 346; *Stevens v. Hartwell*, 11 Metc. (Mass.) 542."

It is, of course, proper to show that the defendant repeated the same words to show malice. Such repetition is evidence of malice, and may thereby aggravate the damages.—Newell on Libel & Slander, pp. 349, 350. Every repetition of a slander, or the publication thereof by

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a newspaper, is a republication, rendering each person so repeating or republishing liable to an action, as well as the initial one. It is no defense that the defendant did not originate the slander or libel. Of course, if the defendant causes or induces the republication, such evidence would be admissible to show malice, and to aggravate the damages to the same degree as if the defendant itself had republished the libel. But it was not shown in this case that the defendant corporation caused or induced the republication, in the Montgomery, Mobile, New Orleans, Atlanta, Pensacola, and Memphis papers, as to which the witness testified. Nor was it shown that the defendant caused or induced various individuals to repeat what the papers had said on the subject of the Knight, Yancey & Co. failure. Of course other newspapers are liable to republish reports such as the one complained of, and people are liable to talk about and discuss such reports and thereby circulate and give notoriety thereto; but the law is that the initial slanderer or libeler is not responsible, in an action of slander or libel, for such repetitions and republications of the libel or slander.

We have not overlooked the fact that there was an attempt to show that the Age-Herald induced or aided in the publication of similar reports in other papers, to wit, the Commercial-Appeal; but there was a complete failure so to do. In fact, it was conclusively shown that the Age-Herald had nothing whatever to do with the publication in other papers, and the proffered evidence on the subject was excluded.

The trial court also erred in giving charge No. 7, as requested by the plaintiff. This charge is as follows: "I charge you that under the law of Alabama this defendant, the Age-Herald Publishing Company, is responsible for the publication of any libel which may result in actionable injury."

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This charge would authorize a recovery against this defendant for publications made by other newspapers than itself, and for which it is not at all responsible. The charge does not even attempt to limit the publication to that made by the defendant, but includes all, by whomsoever made, "which may result in actionable injury." It does not even limit liability to cases which "do result," but includes all which "may" so result. The charge illustrates the erroneous theory upon which the court admitted proof of the publications of the same or similar reports in various newspapers of the South about the time the report in question appeared in the defendant's paper. The trial court seems to have proceeded upon the theory that this defendant is liable for each and all of these separate publications, in this action, which, as we have shown, was erroneous.

Charges 8 and 9, given at the request of plaintiff, were erroneous and improper, as applied to the issues and the evidence in this case; the charges requesting a finding for the plaintiff if the jury were reasonably satisfied from the evidence that the plaintiff had been injured in the manner and under the circumstances averred in the complaint. The defendant had interposed special pleas, in which it alleged that the matters published were as to it privileged matter, and for which publication the defendant was not liable, though the publication would otherwise be actionable. There was evidence tending to support the pleas, and the court could not thus take away from the jury the right to pass upon the same, and, if the jury should have found the pleas to have been proven, then, of course, the plaintiff could not recover.

Charges like the ones in question were held bad, and their giving reversible error in the cases of *Frierson v. Frazer*, 142 Ala. 232, 37 South. 825, and *Alabama Steel & Wire Co. v. Thompson*, 166 Ala. 460, 52 South. 75; the

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latter case overruling the case of *Virginia Bridge Co. v. Jordan*, 143 Ala. 603, 42 South. 73, 5 Ann. Cas. 709. It is true that in those cases the charges were held bad because they ignored the special pleas of contributory negligence; but the rule would necessarily be the same as to special pleas setting up privileged matter in actions of libel and slander.

As the case must be reversed, we deem it unnecessary to pass upon other questions which may not arise on another trial.

Reversed and remanded. All the Justices concur in the reversal as to the points upon which the case is reversed, but do not desire to commit themselves to all that is said in the opinion, deeming this not necessary, since all the counts were eliminated except count 2.

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Failure to Deliver Message.

(Decided May 14, 1914. Rehearing denied June 24, 1914.
66 South. 100.)

1. *Telegraphs and Telephones; Obligation of Telephone Company.*—A telephone company maintaining a line and exchanges to afford patrons the means of telephonic communication are required to exercise a degree of care and skill commensurate with its undertakings, and must employ all reasonable means within its control to secure effective and efficient service; but it is not an insurer, and is not liable for a tortious breach of duty because its service is interfered with or rendered ineffectual by causes beyond its control, not traceable to negligence or intentional misconduct.

2. *Same; Burden of Proof; Negligence.*—The failure of a telephone company maintaining a system to give service at all, or to render effectual or efficient service, is prima facie evidence of negligence of the company or its employees, and to escape liability therefor, the burden is on it to show that the cause was unavoidable by the exercise of due care and diligence, or was the result of acts for which it was not responsible either directly or in consequence of negligent omission to employ due care and skill to discover the effect of such acts, and to remove them after becoming aware thereof.

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3. *Same; Jury Question.*—Under the evidence in this case it was for the jury whether the telephone company negligently failed to render service to a patron desiring to communicate with another patron, but unable to do so.

4. *Same; Non-Performance; Damage.*—Where the failure of the phone company to render service to a patron so as to enable him to call a physician to treat an injured child, was the result of negligence of the company, it was at least liable for nominal damages for breach of contract, or for breach of duty arising out of the contract, and such actual damages as the patron suffered in consequence thereof, provided the patron had not previously breached his contract for service.

5. *Same.*—Under the evidence in this case, it was for the jury to determine whether plaintiff sustained physical injury by reason of physical exhaustion in being obliged to walk to the residence of the physician to call him to attend his sick child, because unable to get telephonic connection on account of the negligence of the telephone operator.

6. *Same.*—If a patron of a telephone company sustained physical injuries by being obliged to walk for a physician to attend an injured child, because of his inability to obtain telephonic connection with such physician, he could recover damages for mental distress caused by delay in communicating with the physician, and delay of the physician in arriving to treat the child who died before the arrival of the physician.

7. *Same; Evidence.*—Where the action was to recover damages for failure of the telephone company to render service to a patron desirous of communicating with another patron, evidence that the mechanism and line was serviceable before and after the failure to obtain service, was admissible to show the condition of the line and mechanism at the time.

8. *Same; Issues.*—Where the contention of the telephone company was that the patron suing for breach of contract to render service had himself breached the contract by failure to pay the rental for the month, and the patron replied that the bill for the month was presented according to the custom of the company and paid after the injury complained of the patron was entitled to testify to a conversation had with the company's manager when paying the rental for the month.

9. *Evidence; Admissions; Time.*—Where the action was by a patron against the telephone company for failure to render service, a statement by the company's manager sometime thereafter to show the qualification of the operator in charge at the time was not admissible.

APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by J. T. Vinson against the Southern Bell Telephone & Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

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The following is the complaint:

Count 2: "Plaintiff claims of defendant \$1,999 as damages, for that heretofore, on, to wit, July 17, 1911, defendant was engaged in the business of operating a public telephone system, serving the public for hire or reward in the transmission of oral messages by means of telephony, and on the day and date aforesaid. and for a long time prior thereto, plaintiff was a patron of said defendant, and plaintiff had installed in his residence near Cullman, Ala., a telephone for his use and for which it charged him the sum of \$1.50 per month, and defendant was under a duty to give plaintiff telephone service with the inhabitants of Cullman, Ala., who had telephones installed in their places of business and places of residence, and to connect plaintiff's said telephone with the telephones of other patrons in Cullman county, when plaintiff called therefor by ringing said central office and requesting that he be connected with such telephone, and on the day and date aforesaid plaintiff's minor son suffering from his said injuries, and in a very critical condition, and in danger of dying, the plaintiff, through his wife as his agent, had arranged with his family physician, who was a patron of defendant, and had a telephone installed in his residence, that if his services were needed to attend plaintiff's said minor son, that he would be called over the telephone during the night, and said physician had agreed to answer said call at once, and thereupon plaintiff, through his agent or servant, informed defendant's agent or servants in said central office in Cullman, Ala., of the condition of his said son, and the arrangements with his said physician; and thereafter, during the evening, the condition of plaintiff's minor son became more critical, and, desiring to call his said physician, he made repeated efforts to secure connection with his said family phy-

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sician over the telephone by ringing said central office, and the agents or servants of said defendant in said central office so negligently conducted themselves in and about giving plaintiff said connection that he failed to secure the same, and thereby failed to get in communication with his said family physician, and was forced, in order to procure the services and attendance of said physician, to leave the bedside of his son, and to walk and run all the way from his residence, to wit, about one mile and a half, to the residence of his said family physician, and during plaintiff's absence his son died. Plaintiff was damaged, in that he was required to pay for the services of said telephone, that he had to expend great physical energy and exertion in procuring the presence of said physician by running from his home to the residence of said physician, one mile and a half, that he suffered great mental anguish because of not being able to procure said physician to attend to his son, and in being absent from his son at the time of his death, and that he suffered great physical pain and exhaustion because of having to run for said doctor, as aforesaid, all of which said damages he claims in this case. The plaintiff avers that said damages and injury were caused by reason and as a proximate consequence of the negligence of defendant's agents or servants or employees in and about conducting said telephone business, to plaintiff's damage in the sum aforesaid."

Count 3: Same as count 2, down to and including the following words: "All of which damages he claims in this case"—and adds the following: "Plaintiff avers that his said damages and injuries were caused by reason and as a proximate consequence of the negligence of said defendant in failing to have in the conduct of its said business, reasonably competent and efficient em

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ployees in said central office, to plaintiff's damage as aforesaid."

Count 4: "Plaintiff claims of defendant \$1,999 as damages, for that heretofore, to wit, on July 17, 1911. defendant was engaged in the business of operating a public telephone system, serving the public for hire or reward in the transmission of oral messages by means of telephony, and on the day and date aforesaid, and for a long time prior thereto, plaintiff was a patron of said defendant, and plaintiff had installed in his residence near Cullman, Ala., a telephone for his use, and for which it charged him the sum of \$1.50 per month and defendant engaged to render plaintiff telephone service by giving connection with all other phones in Cullman, Ala., and to connect plaintiff's said telephone with the telephones of other patrons in Cullman county, when plaintiff called therefor by ringing said central office and requesting that he be connected with such telephone; and on the day and date aforesaid, plaintiff's minor son, one Irving Vinson, was seriously injured, and was lying at plaintiff's home, suffering from his said injuries, and in a very critical condition, and in danger of dying, and plaintiff, through his wife as his agent, had arranged with his family physician, who was a patron of defendant, and had a telephone installed in his residence, that if his services were needed to attend plaintiff's said minor son that he would be called over the telephone during the night, and said physician had agreed to answer said call at once, and thereupon, through his agent or servant, informed defendant's agents or servants in said central office in Cullman, Ala., of the condition of his said son, and the arrangements with his said physician, and thereafter during the evening the condition of plaintiff's minor son became more critical, and, desiring to call his said physi-

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cian, he made repeated efforts to secure connection with his said family physician over the telephone by ringing said central office, and the agents or servants of said defendant, in said central office so negligently conducted themselves in and about giving plaintiff said connection that he failed to secure the same, and thereby failed to get in communication with his said family physician, and was forced, in order to procure the service and attendance of said physician, to leave the bedside of his son and to walk and run all the way from his residence, to wit, about one mile and a half, to the residence of his said family physician, and was greatly delayed in securing the services of his said family physician, and during plaintiff's absence his son died; and plaintiff avers that he was damaged, in this: He paid the regular monthly tolls for the use of said phone, that he had to expend great physical energy in going after said doctor, and was greatly exhausted, and suffered great mental anguish on account of not being able to procure said physician, and on account of having to be away from his said son during his last illness. Plaintiff avers that the cause of action herein stated grew out of the same subject-matter and state of facts as set forth in the other counts of the complaint; that plaintiff's injury and damage was caused by reason and as a proximate consequence of the breach of said contract, in that the said servants, agents, or employees of defendant in negligently failing to make proper connection with the phone of said physician."

Plea 4 is as follows: "There was a regular contract in writing between plaintiff and defendant whereby defendant was requested by plaintiff to establish at his residence a metallic circuit telephone station, to maintain the same and wires connecting it with defendant's exchange, and to furnish service to plaintiff; and plain-

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tiff agreed to pay for such maintenance, etc., the sum of \$1.50 monthly, in advance, from the 1st day of each calendar month; and defendant avers that said contract was breached by plaintiff, in that he did not pay, and had not paid, for such service for the month of July, 1911, on or prior to said July 17, 1911."

The replication to plea 4 that plaintiff was a patron of defendant, and said phone had been established in plaintiff's residence for a long time, to wit, six months, or more, and that it was and had become defendant's custom and practice to present a bill for telephone toll each month, and plaintiff would pay said toll within a reasonable time thereafter; that this custom and practice had continued all during the time said phone had been established in plaintiff's residence; that the bill for the month of July, 1911, was presented according to said custom, and plaintiff paid same after said injury complained of, and said defendant accepted the tolls therefor and allowed said phone to remain in plaintiff's residence, and continued to give service thereon without claiming any breach of said contract on account of the failure to pay said tolls in advance.

BROWN & GRIFFITH, for appellant. As to the care and skill required of telephone companies, see 2 Joyce on Electricity, 1166. The affirmative charge should never be given where there are conflicts in the evidence, or where different reasonable inferences may be drawn.—*W. U. T. Co. v. Louissell*, 161 Ala. 238. A prima facie case was made out and cast the burden on defendant to show want of negligence.—2 Joyce, 1175; *W. U. T. Co. v. Merrill*, 39 South. 121; 35 Ind. 427; 9 Am. Rep. 744. The breach of contract was shown and plaintiff was entitled to nominal damages at least.—*W. U. T. Co. v. Wilson*, 93 Ala. 34; *Adams v. Robertson*, 65 Ala. 586

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Plaintiff was entitled to show the condition of the line just previous to and just after the effort to get service.—*So. Ry. v. Forrester*, 158 Ala. 483; *N. C. & St. L. v. Bingham*, 62 South. 113.

GEORGE H. PARKER, and EYSTER & EYSTER, for appellee. Counsel rely upon the following authorities in support of their contention that there was no error in the ruling of the trial court.—*Ashe v. DeRosett*, 72 Am. Dec. 554; 29 Cyc. 490; Black's Law Dictionary; *B. R. L. & P. Co. v. Cochrum*, 60 South. 307; *Lebanon L. & L. Tel. Co. v. Lebanon Lbr. Co.*, 21 L. R. A. 115; *Middleton v. W. U. Tel. Co.*, 62 South. 745; *Ross v. Western Union Tel. Co.*, 81 Fed. 676; *Stafford v. Western Union Tel. Co.*, 73 Fed. 273; *S. W. Tel. & Tel. Co. v. Solomon*, 117 S. W. Rep. 215-216; *Sou. Bell Tel. & Tel. Co. v. Glawson*, 79 S. E. 491; *Western Union Tel. Co. v. Edmundson*, Vol 2, Am. Neg. Rep. 810; *Western Ry. of Alabama v. Mutch, Admr.*, 97 Ala. 196; *Yazoo & M. V. R Co. v. Foster*, 23 South. 582.

MCCLELLAN, J.—During the afternoon of July 17, 1911, the plaintiff's (appellant's) 17 year old son was injured about the head by a fall from a bicycle. Dr. Baird, plaintiff's family physician, attended the boy about 4 o'clock in the afternoon, diagnosing his condition to be the result of concussion of the brain. Both Dr. Baird and plaintiff were regular subscribers, whose obligation was to pay monthly, for residence telephones with the defendant company. They had been so for many months, if not longer. The service afforded such subscribers in and about Cullman, Ala., included the maintenance, day and night, of the usual central office in the town, whereby, in response to the mechanically produced fall of a "drop" on the central office switchboard, the attention of the operator would be called

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and given the calling phone, and connection thereof with the other phone desired would be effected. If the operator left the switchboard for sleep or refreshment the practice was to so order the switchboard mechanism as to cause the setting off of a bell or gong when the "drop" fell. This arrangement would ordinarily serve the purpose of a persistent and loud alarm.

The successful operation of these processes depend, of course, upon the working condition of the mechanism and wire connection provided, as well as upon appropriate manipulation or action by the person desiring to call another person, by the operative, and by the person intended to be communicated with.

The counts under which the evidence was taken were 2, 3, and 4 as amended. The first two declare as for a breach of duty and are in tort; and the last (4) is for the breach of the contract. The pleas, surviving demurrer, were the general issue numbered 1, and that numbered 4, which, though not addressed to the counts *separately*, asserted the breach by plaintiff of his contract for the service of a phone in his residence by nonpayment by a stipulated date of the rental sum. Plea 2, setting up a failure to present the claim within a particular period was stricken on demurrer. In addition to a general traverse of this plea 4, the plaintiff replied that the custom was, and had long been, to allow payment of the rental by a subscriber by a reasonable time after presentation of an account therefor, and that plaintiff paid, and the company accepted without question, the rental sum for the month averred in plea 4 to have been the occasion of the breach alleged. The special rejoinder to special replication 2 was stricken in response to plaintiff's demurrer. The issues made were those raised by averments of the counts mentioned above, of the plea 4, and of special replication 2.

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The court gave the general affirmative charge, on the whole case, for the defendant (appellee.) The scope of the review here, on the plaintiff's appeal, will appear from the opinion.

The report of the appeal will contain counts 2 and 3 and amended count 4.

After careful review of the entire evidence, the opinion prevails that the court erred in giving the general affirmative charge requested by the defendant. There was evidence, or inferences fairly deducible from evidence, that required the jury's solution of every material issue raised by counts 2, 3, and 4 as amended. Manifestly the affirmative charge was not defendant's due on the theory that the issues made by plea 4, the general replication thereto, and the special replication thereto, were incontrovertibly established in the evidence.

It is the duty of telephone companies maintaining lines and exchanges for the purpose of affording patrons the means of telephonic communications to exercise in that public service a character and degree of care and diligence and skill commensurate with their undertaking. All reasonable and proper means and agencies within their control should be employed to secure effective, prompt, and accurate service. The duty exacted comprehends reasonable and proper care, skill, and effort to afford for the service undertaken suitable appliances, instruments, and apparatus, and competent and skilled servants, agents, and operators. And if the appliances, instruments, or apparatus are defective, or if the operatives are incompetent or unskilled, or if there is other negligence in respect of the service undertaken, liability attaches for the loss or damage proximately resulting therefrom to one entitled to proper, prompt, and efficient service. Such companies are not

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insurers; and where the service undertaken is interfered with, or rendered ineffectual by, uncontrollable causes—causes not traceable or ascribable to negligence or intentional misconduct in respect of the duty assumed—such companies are not liable for a tortious breach of duty.—2 Joyce on Elec. Law, § 733.

Where a telephone company installs an instrument through which it undertakes, for a consideration, to afford continuous telephone service, or service during definite parts of the day or night, or service upon application therefor through public stations, and persons authorized to avail of the service pursue the usual method to effect the use of the telephonic system so tendered by the company, and the telephone service so undertaken to be afforded is not given, or is insufficiently or ineffectually afforded, the presumption *prima facie* is that negligence of the company, or of its servants or employees, is the cause of the failure of the telephone service, or of its inefficiency; and the obligation to rebut the *prima facie* presumption thereupon passes to the telephone company; which presumption may be rebutted by proof that the cause was of an uncontrollable nature or was unavoidable by the exercise of due care, skill, and diligence, or was the result of acts for which the company was not responsible, either directly or in consequence of its negligent omission to employ due care and skill and diligence to discover the effect of such acts and to remove or repair after becoming aware thereof.

The application of the doctrine to the evidence adduced required the submission of the issues to the jury's determination. The contract between plaintiff and this company for continuous telephone service covering the time in question was shown. There was evidence tending, at least, to show: Repeated efforts to reach the central office by the usual method for that purpose,

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through the operation of the instrument in plaintiff's dwelling; that these efforts covered a period from about 10 o'clock to near 11 o'clock, in the evening; that no response was had thereto from the central office; that the mechanism in the central office constructed to direct the operator's attention to the call did not make the call, or, if it did so, that the operator took no account thereof, paid no heed as she should have done, thereto; that uncontrollable causes that might have operated to prevent the normal effectiveness of the telephonic mechanism from plaintiff's dwelling to and in the central office did not intervene on this occasion; that a representative of the company in the central office was advised, earlier in the evening of July 17, 1911, of the probable desire or necessity for telephonic communication from plaintiff's dwelling to Dr. Baird, another subscriber and the family physician, in reference to plaintiff's son's condition, which was serious; that the occasion for such communication arose; that, the physician would have responded; that, in consequence of the failure of the telephone service engaged to be afforded plaintiff, there was delay in bringing the physician to the bedside of the son; that, in further consequence, the father, being greatly alarmed at the obviously serious symptoms manifested by the stricken son, went afoot to bring the physician; that the distance from his home to the physician's home was approximately a mile and a half; that he traveled rapidly; that when he arrived at the home of the physician, he was "exhausted"; that he and the physician returned afoot to the bedside of the son; and that when they had reached a point near the plaintiff's home they were advised that the son was dead.

If the failure of the service was found by the jury to have resulted from negligence on the part of the com-

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pany, or of its employees, and if the contract for telephone service was not breached, as averred in plea 4, the plaintiff was at least entitled to recover nominal damages for the breach of contract, or for breach of the duty arising out of the contract, for telephonic service, but also such actual damages as he suffered in consequence thereof.

It cannot be affirmed, as a matter of law, that the physical effort expended by plaintiff to secure the physician—an effort that proper telephonic service and communication would have rendered unnecessary—was only a mental disturbance or discomfiture. ‘Injury to the person’ is, we doubt not, synonymous with bodily hurt, bodily harm. Great physical effort may be immediately productive of that character of hurt or harm. If such effort produces physical exhaustion, it is open, at least, to be concluded that bodily harm or hurt has, though not visibly manifested in impaired physique, resulted. Such a draft upon vital organs may produce direct effects hurtful, harmful to the physical man, to the person. It has never been supposed that only permanent injuries were injuries to the person; nor that only visible injuries or injuries susceptible of being discovered or known through any of the five senses of another observing the person alleged to have suffered injury were injuries to the person. The absence of some sort of physical manifestation of injury to the person is, of course, evidence of the absence of such injury; and, in cases where the injury claimed is of the obvious, one way or the other, such evidence is of course conclusive. It was a jury question on the evidence here whether the physical effort expended by plaintiff resulted in injury to his person; and, if so, mental distress suffered in consequence of the delay in communicating with the physician and in consequence of the physician’s absence after

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he could, and probably would, have arrived at the bedside before the death of plaintiff's son was, if shown, an element for which damages might be awarded, the relationship between plaintiff and person to be attended by the physician being such as to allow the jury to draw the inference of mental distress on that account (*W. U. Telegraph Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148); provided the testimony tending to show notice to the company's agent or servant of the likelihood that a call for the physician that night would be made over the telephone was credited by the jury.

Any evidence, such as satisfactory use and serviceableness of the mechanism and line of which plaintiff was entitled to be served, during the evening of the son's death and during the next morning, should have been received as tending to show the condition of the mechanism and the line.

If the mechanism and line were in working condition shortly before and after the occasion in question, it was evidence, in connection with the other evidence, to go to the jury upon the issues of neglect by the operative in respect of attention to the service the company had engaged to afford.

Under the issues made by the pleadings, the plaintiff should have been allowed to recite his view of the full conversation with the company's manager (Cassels) when he paid the rental for the month of July; but any statements then made by the manager could not be received for the purpose of showing the qualification of the operative in charge on the night in question.

The judgment is reversed, and the cause is remanded.
Reversed and remanded.

ANDERSON, C. J., and SAYRE and DE GRAFFENRED, JJ.,
CONCUR.

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Injury to Passenger.

(Decided June 30, 1914. 66 South. 82.)

1. *Husband and Wife; Injury to Wife; Recovery by Husband.*—A husband deprived of the society and services of his wife on account of injury to her by the wrongful act or omission of another may recover compensatory damages therefor, but he cannot recover for the injury itself; hence, a complaint by the husband in such a case he need not itemize the particular injuries inflicted on the wife.

2. *Evidence; Admissibility; Self-Serving Declaration.*—In an action by the husband for damages for the loss of the services and society of his wife on account of injuries to her, the testimony of the wife that she did her household work before the injury, but was unable to perform such service afterward, was not inadmissible as a self-serving declaration.

3. *Appeal and Error; Review; Objection Below.*—Where no objection was seasonably interposed in the trial court to questions propounded to a witness, and responsive answers thereto, such objection cannot be considered on appeal.

4. *Damages; Wife; Loss of Service; Evidence.*—Evidence of the service performed by the wife for her husband before her injury, and that she was unable to perform such service thereafter, was admissible in an action by the husband for damages for the loss of the society and services of his wife.

5. *Same.*—Where a witness testified that she was intimately acquainted with the wife, and that her health appeared to be excellent, and that she was very active before her injury, it was competent for such witness to testify further that she had never known of the wife to complain of a headache or be in bed a day.

6. *Same.*—It was proper to admit the testimony of a physician who attended the wife that she suffered pain, the action being by the husband for damages for loss of service and society of his wife, because of injuries.

7. *Same.*—It was competent for plaintiff to testify as to manifestations of pain by his wife, and the duration of the condition, on the question of the loss suffered by him from her injury.

8. *Carriers; Passengers; Instructions.*—Where the action was by the husband for damages for the loss of society and services of his wife because of injuries received in alighting from a street car, and there was evidence from which it might be inferred that defendant was negligent in prematurely starting the car, although the starting was properly done, a charge asserting that it is not negligence for those in charge of a car to start the same in a proper manner, while a passenger is inside of the car walking towards the door, was properly refused.

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APPEAL from Birmingham City Court.

Heard before Hon. C. W. FERGUSON.

Action by J. T. Roach against the Birmingham Railway, Light & Power Company, for damages for loss of service and society of his wife by injuries inflicted by defendant upon her while a passenger. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint, after stating the relation existing between plaintiff's wife and defendant and between plaintiff and plaintiff's wife, alleges that defendant so negligently conducted itself in or about the carriage of plaintiff's said wife as a passenger on said car that, as a proximate consequence of said negligence, plaintiff's wife was injured (here follows catalogue of injuries), and, as proximate consequence of said injuries to his said wife, plaintiff lost the services and society of his said wife for a long time, and was rendered likely for a long time to continue to lose the services and society of his said wife, and the services and society of his said wife were rendered permanently of less value to plaintiff, and plaintiff was put to great trouble, inconvenience, and expense for medicine, medical attention, care, and nursing in or about his efforts to heal and cure the injuries of his said wife. The demurrers raise the proposition that it does not appear what duty defendant owed plaintiff, or wherein or how defendant violated such duties, if any was owing, does not constitute negligence as a matter of law, does not appear what was the proximate cause of the injury to plaintiff's wife; her injuries are not sufficiently described; plaintiff's injuries are not sufficiently described.

Assignments of error referred to are as follows: (14) Overruling appellant's objection to the following question propounded to appellee by his counsel: "From the time she was hurt, from the time you found her in bed

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there on the 25th of October, 1912, from that day on, has she been able to attend to that work—household work—well, has she done it?”

(15) Repetition of former question, “Well, has she done it?”

(9) Question to Mrs. Annie Faulkner: “What condition was Mrs. Roach in when you left?” Answer: “Still suffering from her side, when I went home to send a hot water bottle over there to use on her side.”

(10) To same witness: “Is it your best judgment that Mrs. Roach has ever regained her perfect health you say she had before she was hurt?” Answer: “Don’t get about like she did before the accident.”

Unnumbered charge set out in sixteenth assignment: It is not negligence for those in charge of a street car to start the same in a proper manner while a passenger is inside the car, walking towards the door.

TILLMAN, BRADLEY & MORROW, and JOHN S. STONE, for appellant. The court should have sustained demurrers to the first count of the complaint.—*City D. Co. v. Henry*, 139 Ala. 165; 16 Enc. P. & P. 377. It is incompetent for the wife to testify that she did her housework before the accident, but could not do it afterwards.—*B. R. L. & P. Co. v. Cochran*, 60 South. 309; *Pope v. State*, 168 Ala. 43; *Marsh v. Frick*, 56 South. 112. Appellant was not entitled to any compensation for pain suffered by his wife, and the court was in error in admitting evidence thereof.—*Phillips v. Kelly*, 29 Ala. 634; *L. & N. v. Perkins*, 165 Ala. 472. The charge requested should have been given.—*B. R. L. & P. Co. v. Parker*, 156 Ala. 252; *Mobile L. & R. R. Co. v. Bell*, 153 Ala. 90.

HARSH, BEDDOW & FITTS, for appellee. While the husband may not sue for the injury itself, he has the

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right of action against the wrongdoer for the loss of the service and society of his wife, because of the injury. It is not necessary, therefore, that the complaint particularize the injury.—*B'ham Southern v. Lintner*, 141 Ala. 420; *So. Ry. v. Crowder*, 135 Ala. 418; 10 Enc. P. & P. 207. On these authorities, it must be held that there was no error in the admission of evidence. Objections must be seasonably interposed in the trial court before they can be considered on appeal.—*Mississippi L. Co. v. Smith*, 152 Ala. 540; *Creel v. Keith*, 148 Ala. 233. The extent and severity of the injuries to the wife were directly involved in ascertaining the extent of the husband's loss and deprivation.—*B. R. L. & P. Co. v. Lavender*, 158 Ala. 434, and authorities *supra*. The charge assumed that the car was properly started and was also abstract.—*So. Ry. v. Weatherlow*, 164 Ala. 151; *B. R. L. & P. Co. v. Lavender*, *supra*.

MCCLELLAN, J.—This action by the appellee against the appellant is for damages resulting to him (the husband) in consequence of the injury of the wife while a passenger on the defendant's street railway. Where, through the wrongful or negligent act or omission of another, a husband suffers deprivation, in respect of the society and services of his wife, he may recover compensatory damages therefor; but not for the injury itself.—*Sou. Ry. Co. v. Crowder*, 135 Ala. 418, 33 South. 335; *Birmingham Ry. Co. v. Lintner*, 141 Ala. 420, 38 South. 363, 109 Am. St. Rep. 40, 3 Ann. Cas. 461. The complaint accorded in its averments with a sufficient statement of plaintiff's assertion of a right to compensation under the doctrine stated. The demurrer was properly overruled. There is no occasion, in such cases, to define or itemize the particular injuries suffered by the wife. The rule is quite different where the imme-

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diate subject of the action is the injury to the plaintiff, as was the case in *City Delivery Co. v. Henry*, 139 Ala. 165, 34 South. 389.

The wife of the plaintiff was examined as a witness in his behalf, and testified to her physical injury in consequence of the sudden movement of the car, while stationary, at a time when she, a passenger, was moving down the aisle of the car preparatory to alighting therefrom at a regular place for the discharge of passengers. She described her injuries and how they were inflicted. She further testified that she was well and strong up to the time of this injury; that she had not been well since that time; and that up to that time she "was doing the biggest part of my (her) housework, for my (her) husband and family." Plaintiff's counsel, at this stage of the examination, propounded the following question to the witness: "Well, after that were you able to do your housework, or did you do it?" The objection's grounds, addressed to the question as a whole and then to each alternative of it separately, embraced these grounds: That a conclusion was sought thereby; that it sought to elicit testimony of an inadmissible self-serving character. Comprehended in the violated right and consequent losses for which a husband, in such cases, is entitled to be compensated are deprivation, because of injury wrongfully inflicted upon the wife, or services which the wife formerly customarily rendered the husband in the household. Legal evidence to show such deprivation is necessarily material and relevant. The manifest object of the quoted question was to afford evidence to establish that element of recoverable damage, if the plaintiff was otherwise entitled to recover. So the question, if objectionable at all, must have been on account of its form rather than of its substance. It is obvious that the latter alternative thereof called for a

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fact, viz., did you, after the injury in question, do household work, which, she had just testified, she had theretofore done in the larger proportion. It is insisted that the ruling in *Cockrum's Case*, 182 Ala. 549, 60 South. 304, 309, to the effect that a similar character of evidence was objectionable because possible of being self-serving, should be held for authority in support of the latter ground of the objection. The pertinent statement made in that case (Cockrum) has been reconsidered by the full bench. The statement there was not decisive of the result of that appeal. Our conclusion now is that it is unsound. The testimony there considered and that now under review was evidential of a material fact within the issues of the trial. Whether the injured party did or did not, after and because of the injury complained of, perform work or services theretofore customarily performed was a fact exempt from denial of proof because self-serving. Any witness, whether the party or not, who knows the fact, is competent to testify that after the injury the injured party did not perform the work or services theretofore customarily performed. If the adversary party conceives that the inability to perform such work or services, after and because of the injury, was feigned, it is the office of cross-examination or the adduction of countervailing evidence to bring before the jury the basis for that view. The court did not err in allowing the question quoted above. Upon like considerations assignments numbered 14 and 15 are without merit.

Appellant can take nothing by the motions to exclude these statements, pertinent to Mrs. Roach's condition in respect to health and activity, before her injury, of the witness Mrs. Faulkner, who was examined on interrogatories: "I never knew her even complain of a headache. * * * Never knew her to be in bed a

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day." This witness had already testified that she had been intimately acquainted with Mrs. Roach, and that her health appeared to be excellent, and that she was very active. The responses quoted were, in effect largely, if not entirely, affirmatory of what she had already testified. But, aside from that, those responses, by an intimate acquaintance and neighbor of the subject of the inquiry, were no more than a negatively expressed affirmation of Mrs. Roach's freedom of a particular trouble and her exemption up to that time of any confining malady—facts which, if she knew them, the witness might have testified.

The other two questions set forth in the ninth and tenth assignments of error, with the responsive answers made thereto, cannot avail appellant, for that objections to the interrogatories were not seasonably interposed.

The motion to exclude the testimony of Dr. Copeland, the physician attending Mrs. Roach, wherein he testified to pain having been suffered by her, was properly overruled.—*Eckles v. Bates*, 26 Ala. 655; *Birmingham Ry. Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748.

The questions to the plaintiff, as a witness, whereby it was sought to show his wife's expression, or manifestations of pain when turned by him in bed, to which she was confined, and to the duration of her condition so as to require her movement by the use of the sheet, were not objectionable. The evidence they elicited was immediate in its bearing upon the primary inquiry of basis for the loss alleged to have been suffered, in consequence of her injury, by the husband.—*Birmingham Ry. Co. v. Lintner*, *supra*; *Eckles v. Bates*, *supra*.

Charge 4, given at the instance of defendant, removed any possible prejudice to defendant by reason of the

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refusal of the charge set out (unnumbered) in the sixteenth assignment of error. But, aside from that, the charge which purports to announce a general rule cannot be approved where negligence might be imputed from the premature starting, though properly done, of a car in which a passenger may be moving with the rightful purpose to alight therefrom.

The assignments of error insisted upon in brief are without merit. The judgment is affirmed.

Affirmed. All the Justices concur.

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Trespass and Trover.

(Decided June 30, 1914. 66 South. 54.)

1. *Trespass; Party Entitled to Sue.*—One not in possession nor entitled to possession cannot maintain trespass *quare clausum* for the wrongful removal of fixtures placed on real estate by a lessee and his sub-lessee.

2. *Landlord and Tenant; Removal of Structure; Liability.*—Where the owner of practically all the stock of a traction company, which held as sub-lessee, an amusement park, directed the manager to remove fixtures, but not to remove or disturb any of the buildings, and did not give any directions for the removal of a track in the park, he was not liable for the act of the manager in removing or disturbing the buildings, and in removing the tracks, and his mere knowledge of the removal of the track was not sufficient to render him liable personally.

3. *Fixtures; Removal; Action; Waste.*—An action in the nature of waste lies for the wrongful removal of fixtures by a tenant which results in injury to the reversion, and the landlord may apply for an injunction before the removal.

4. *Same; Right of Lessee.*—In the absence of any provision in the lease to the contrary a sub-lessee of an amusement park may remove amusement devices erected by it, if removable without serious injury to the freehold, and made during the term.

5. *Same; Lease; Construction; Trade Fixtures.*—A provision in the lease of an amusement park that after the expiration of the term the lessor may repossess himself, and that all improvements erected on the land during the lease shall revert to him, and that the land with improvements shall revert within thirty days after non-payment

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of rent at maturity, the failure to perform other conditions on giving notice will not authorize the lessor to prevent the removal by the lessee or the sub-lessee of trade fixtures; the word "improvement" being confined to alterations, repairs, or improvements on the premises not including articles in their nature, chattels.

6. *Same; Trade Fixtures*.—Mere machines or trade fixtures in the nature of chattels, capable of being detached without material injury to the freehold, may be removed by the lessee or his sub-lessee during the term; the machines or trade fixtures having been erected by the lessee or his sub-lessee as fixtures.

APPEAL from Montgomery City Court.

Heard before Hon. ARMSTEAD BROWN.

Action in trespass and in trover by Bessie W. Walker against Richard Tillis. From a judgment for defendant, plaintiff appeals. Affirmed.

The following is the lease contract referred to as attached to the complaint:

This agreement made and entered into this 10th day of June, 1912, by and between Bessie W. Walker and Hal T. Walker of the city of Montgomery, parties of the first part, and Frances E. Ayres of the same place, party of the second part, witnesseth: That the said parties of the first part have this day leased to the party of the second part for a term of twenty years said lease commencing on January 1, 1902, and ending on December 31, 1921, 81 acres of land owned or controlled by said first parties [here follows description of the land] conditioned as follows: (1) That the party of the second part shall only cut down from said land such shrubbery or forest timber under 4 inches in diameter as he, in his judgment, may wish to cut for the purpose of beautifying said land for park purposes, and all timber cut, together with all dead timber now on said land, and all such timber as may have been cut on said land before the signing of this lease by the party of the second part, shall remain the property of the said party of the first part, and said parties of the first

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parts, their agents or attorney, shall have free access to the park for the purpose of removing same at any time. (2) Said land shall be used only for park purposes and a pleasure resort during the life of this lease. (3) At the expiration of this lease, the second party agrees that the said first parties shall have the right to enter into and upon said land, and repossess themselves thereof, and all improvements of whatever kind and nature erected upon said land during the life of this lease shall revert to the first parties hereto and become their property in fee simple without process of law. (4) That for and in consideration of said lease for said lands the second party hereby binds himself, his executors, administrators, and assigns, to pay to the first parties the sum of \$400 per annum, payable quarterly, as rent for said land, and has executed his several promissory notes therefor. (5) That in case of failure upon the part of the second party hereto to pay said rent when the same becomes due within 30 days thereafter, or to perform any of the other conditions or stipulations of this lease after having been given 10 days written notice of his failure to do so by the said parties of the first part, then the land and all the improvements thereon at the option of first parties shall revert to and become the property of the said first parties. (6) Nothing in this lease shall be so construed as to prevent the parties of the first part from granting a right of way by deed or lease through any part of said leased land for street railway purposes.

W. A. GUNTER, and A. A. EVANS, for appellant. Tillis came in under Ayers, who rented from Walker, and hence, could not dispute the title. Plaintiff proved her case fully, leaving open only the dispute whether or not the articles could be regarded as improvements of some

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kind or other, which were erected and placed upon the demised premises. That they were improvements within the term of the lease, see 1 Atl. 623; 16 How. 220; 29 Barb. 363; 2 M. & G. 727; 47 N. Y. Supp. 1102; 18 Com. Bench, 893; 137 N. Y. 163; 13 Atl. 523; 74 Tex. 605; 97 Mass. 279; 1 J. & H. 436; 2 H. & C. 777; L. R. 1 K. B. 87; 7 Port. 106; *Johnson v. E. M. & T. Co.*, 129 Ala. 515; *Broadus v. Smith*, 121 Ala. 335. The covenant is to be construed most strongly against the covenantor.—*Nelson v. Manning*, 53 Ala. 549; *Chambers v. Ringstaff*, 69 Ala. 140.

RAY RUSHTON and M. W. WILLIAMS, for appellee. The articles removed were fixtures and not improvements, within the terms of the lease.—19 Cyc. 1047, 1058, 1061, 1062; 84 Am. St. Rep. 884. Before the expiration of a lease the tenant may remove improvements made by him in aid of his trade, or for ornament or more convenient use of the premises.—19 Cyc. 1065; 55 Fed. 229; 44 Atl. 1024; 102 Mass. 201; 142 U. S. 396; 4 Lea 333; 48 Pac. 172; 116 Mass. 155. The traction company would not have lost its property even if it had entered upon the lands without any contract whatever.—*Jones v. N. O. & S. R. R. Co.*, 70 Ala. 227. For a proper construction of the contract, see *Hill v. Townsend*, 69 Ala. 287.

MAYFIELD, J.—Appellant sued appellee in trespass and in trover, claiming \$50,000 damages for that the defendant willfully and maliciously tore down and carried away improvements consisting of houses and parts of houses and fixtures and other improvements attached to, and forming parts of, realty belonging to the plaintiff; the count in trover adding that the plaintiff had converted the same to his own use.

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Count 1 was in trespass, and claimed \$10,000 as actual damages for value of the structures torn down, and \$40,000 as punitive damages for malicious injury and destruction of the property.

The second count claimed damages only for a willful and malicious trespass committed upon the plaintiff's freehold by the demolishing and tearing down of the property, and the removal of the same.

The third count was in trover for conversion of the fixtures and improvements after they were severed from the freehold.

The fourth count claimed damages merely for the malicious tearing down and removal of the property mentioned, which was a part of and attached to the realty.

The fifth count was like the fourth, but added that the wrongful act of the defendant was an injury to the freehold.

Counts 1 and 4, by appropriate averments, refer to, and attach as exhibits thereto, a certain lease contract made by the plaintiff with one Frances E. Ayres, which contract the reporter will set out in full. This contract was subsequently assigned by Ayres to the defendant, Tillis, who subsequently transferred his interest in the premises to the Montgomery Amusement Company, which company used the premises for two or three years as an amusement park. The stock of said company was subsequently acquired by another corporation, the Montgomery Street Railway Company, which was thereafter consolidated with the Montgomery Traction Company, and this last-named corporation operated the park until the spring of 1909. The wrongs and injuries hereinafter complained of occurred during the month of July, 1909.

At the time of the original lease by the plaintiff to Ayres the lands consisted mainly of swamp and wood-

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lands, which were later developed into a pleasure resort.

Prior to the spring of 1909 "there were built on the premises, by the tenants, the following buildings: A dining hall, a street railway station, a theater, a dancing pavilion, a skating rink, barbecue pits, a billiard room, and a bowling alley building. There were also installed at the said park, by the tenants, several devices used solely for the amusement and entertainment of the visitors and patrons of the park. They were commonly known as 'amusement devices,' and among them were the following: A 'merry-go-round,' a 'roller coaster,' a 'Hale's touring car,' a 'revolving swing,' and a 'bowling alley.' "

This park and pleasure resort was connected on the southwest with the city of Montgomery by a street electric railroad, touching it on the southwest corner, operated by the said Montgomery Street Railroad Company, owned in whole or in larger part by the said Richard Tillis.

There was evidence to show that afterwards a rival electric railroad company was organized and operated against the said Montgomery Street Railroad Company. This company obtained from the plaintiff a right of way for an electric railroad into said park, as shown by a deed executed by the plaintiff and her husband to the said traction company.

The only connection that the defendant is shown to have had with the amusement park, or with the wrongs and injuries complained of, is that he purchased the interest of Ayres in the lease, and subsequently assigned it to the amusement company, which was absorbed by the Montgomery Street Railroad Company, which, in turn, was consolidated with the Montgomery Traction Company, and that the defendant, Tillis, owned practi-

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cally all the stock of the new corporation, and that after the consolidation of the two companies, and until the spring of 1909, the park was operated by the Montgomery Traction Company.

During the spring of 1909, the patronage of the park having almost ceased on account of mosquitoes and malaria at the park, the defendant, Tillis, had a conversation with Ginnivan, the manager of the traction company, in which conversation Tillis stated to Ginnivan that he (Tillis) thought it would be better to discontinue Electric Park and build up Pickett Springs, another pleasure resort of the Montgomery Traction Company, and for him to go to work to accomplish that end. Tillis told Ginnivan that he had better remove the different devices out there, but not to remove any of the buildings or disturb them. Tillis did not tell Ginnivan anything about the railroad track, but knew that he did move it; nor were any orders given by Tillis to any one else to remove the track. There was nothing said about moving the track at that particular time. Tillis stated in his testimony that the track was used "when we needed the rails, from time to time, from early in the spring up to June, after the devices were taken away."

During the spring of 1909, prior to July 1st, Ginnivan, the manager of the traction company, tore down and carried away a "merry-go-round," and also an iron structure supported upon concrete foundations to which the merry-go-round was fixed by iron bolts and nuts. The merry-go-round was operated by a motor fastened to the foundation in such way that it could be taken loose. The electric current for operating it was brought by wires from the city of Montgomery, and connected by an arrangement above the merry-go-round. The merry-go-round was made in sections which could be

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easily adjusted and fastened to the concrete foundation, which was not removed. Ginnivan carried away a picket fence inclosing a swing which was one of the amusement devices; and he took down and removed the swing, a steel structure 40 feet high, supported upon a concrete foundation and attached by means of rods and nuts. Said swing was also put up in such manner that it could be removed when desired. Manager Ginnivan also removed the end of a shed in which was a device called "Hale's touring car," in order to take out the car. The shed was made of wood and canvass, without flooring, and was built especially to inclose this car. Ginnivan also tore down and carried away a "roller coaster," which was a structure 80x175 feet, consisting of posts firmly framed together, some 20 feet high; part of it was a train track for running small cars in which persons could be seated, the cars being attached to a cable by which they were lifted or made to rise to the highpoints, and then, being freed from it, were carried along the track by gravity and momentum, down and up grade, around and through the structure, back to the starting point. The machinery operating the cars was connected with electric motors which drew the cars up the first ascent by cable. Ginnivan removed a bowling alley used in the game of ten pins, and manufactured in sections and so put down as to be easily moved. None of the flooring of the alley was removed, so far as the evidence shows. The manager took away about 750 feet of electric railway including posts and fixtures, located upon the land in question.

The defendant, being put upon the stand as a witness in his own behalf, testified that he bought out the said traction company, and owned practically all of its stock, and that he was familiar with the terms of the said Ayres lease. He also testified, against the objec-

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tion of the plaintiff, that Mr. Rushton was president, and also attorney of the traction company, and that in a conversation between him and the said president his recollection was the said president told him that he could remove the structures which he did remove.

A demurrer being sustained to the first count, the trial was had upon the remaining four, and the trial court gave the affirmative charge in favor of the defendant, which, of course, resulted in a judgment in his favor; and from that judgment, the plaintiff prosecutes this appeal.

The only error assigned or insisted upon is the giving of the affirmative charge for the defendant.

Of course there could be no recovery in this case in trespass *quare clausum fregit*, for the reason that it is admitted that the plaintiff was not in possession, nor entitled to the possession, of the land at the time of the wrongs and injuries complained of, and it should be said that no such contention is made by the appellant; but it is contended by her counsel that she is entitled to recover, either in trespass *de bonis asportatis* or in trover, as to the fixtures, improvements, or devices which the evidence showed that the manager of the traction company had torn down and carried away under the direction, or with the consent, of the defendant, Tillis.

The remedies of the landlord in a case like this are stated by Mr. Wood (2 Landlord and Tenant, § 531) as follows: "An action on the case in the nature of waste lies for the wrongful removal of fixtures, for such removal amounts to an injury to the reversion, which the law regards as waste; and where the act amounts to a breach of covenant the landlord may sue either in case, or on the covenant, as he prefers. He may also, before the removal, apply to a court of equity for an injunction to prevent the removal. Although a landlord

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cannot maintain an action of trespass for entering the premises during the occupation of the tenant, because occupation is necessary to maintain that form of action, yet immediately upon the severance of the fixtures from the realty they become mere chattels, and he may maintain an action of trespass for taking them away, for the property is vested in him from the time of severance; or where the fixtures have been unlawfully severed from the freehold and carried away, or otherwise converted or disposed of, he may maintain trover for their value. In trespass for taking the plaintiff's goods, chattels, and effects, it was held that the value of fixtures might be recovered under those words."

It is certain that there could be no recovery against this defendant, Tillis, as to any buildings or parts of buildings, or for injury thereto, for the reason that the undisputed evidence shows that Tillis expressly directed the manager not to remove or disturb any of the buildings. For the same reason it is certain that there could be no recovery against Tillis as to the removal of the street railway, for no orders were given by him to the manager or to any one else to remove the track, and for the reason that the railway track was placed upon the premises under a different contract from that relied on by the plaintiff in counts 1 and 4; and without this contract and without any evidence connecting Tillis with the removal further than that he owned practically all of the stock of the corporation which owned the street car track which was removed, his mere knowledge of its removal is not sufficient to render him liable personally in either trespass or trover for such removal.

The question is therefore narrowed down to this: Was there any evidence which showed or tended to show that the defendant, Tillis, was liable to the plain-

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tiff in trespass or in trover for the acts of Ginnivan in tearing down and removing the amusement devices before mentioned?

Mr. Ewel, in his work on Fixtures (page 1), says: "There is perhaps no other legal term which has been used in so many differing and often contradictory significations as the word 'fixtures.' In the discussion of the subject there has arisen a number of terms expressing more or less explicitly those different significations. Among these terms may be mentioned those of 'tenant's fixtures,' 'landlord's fixtures,' 'removable' and 'irremovable fixtures,' 'trade fixtures,' etc. The question as to whether certain property is a chattel, a 'removable' or 'irremovable fixture,' or a part of the realty is made to depend sometimes upon the degree of the annexation of the chattel to the land, and the intention with which such annexation was made. The term 'fixture' is sometimes used to denote articles of a chattel nature, which, when once annexed to the land, may not be removed by the party annexing, as against the owner of the freehold. In the most general sense of the term it means any annexation or addition which has been affixed to, or planted in, the soil of the land. In other words, the books have sometimes defined the term 'fixture' to include whatever is affixed to, and cannot be removed without injury to, the freehold, and it becomes thereafter a part of it."

But, as was said by this court, in the case of *Rogers v. Prattville Co.*, 81 Ala. 483, 1 South. 643, 60 Am. Rep. 171, no precise rule can be given which will determine in all cases whether any given property is a chattel or a fixture. This "varies with the different relations of parties, and is largely dependent on intention" of the parties as "shown or inferred."

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In that case *STONE*, C. J., said that there are cases which hold that, when a building is constructed for manufacturing purposes, all the machinery and appliances used in connection with the business, whether attached to the realty or not, become a part of it, and adds that our own court has not gone to this extreme length, as with us mere use, in connection with the business, does not so annex machinery to the realty as to constitute it a part thereof. Intention is more or less a factor in such instances. It often depends upon the intention of the party making the annexation. The precise point at which a chattel loses its character as such and becomes a part of the realty, is difficult to define by any fixed rule applicable to all cases.

In the *Rogers Case*, before mentioned, it was held that the mere use of machinery in a mill or factory did not necessarily annex it to the realty so as to constitute it a part thereof.

The rules of law as to fixtures are different when applied between parties occupying different relations; that is, the rules are different as applied to heirs and administrators, vendors and vendees, mortgagors and mortgagees, and landlords and tenants. The rigor of the common-law rule as to fixtures has been relented in favor of the tenant, as between him and the landlord, both in England and in America.

In *Poole's Case*, 1 C. 368, decided in the year 1703, Holt, C. J., held that a tenant who was by trade a soap boiler, and had, for the convenience of his trade, put up vats, copper boilers, partitions, etc., and paved the back yard, had the right during the term of his lease to remove such fixtures. This is probably the first case that put the question of trade fixtures of a tenant upon a clear and satisfactory basis; and the rule was stated to be in favor of trade, and to encourage industry, and has

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ever since been regarded as the original ground for the exceptions as to trade fixtures made by tenants.

The American courts have added to this reason given by the English courts one upon which they say the exception is in part founded—that is, the subserviency of public policy; that the intention of the tenant making the annexation was to serve the convenience of his trade, and not to enhance the freehold; that it was the reasonable intention of the tenant to place such trade fixtures upon the land, for the purpose of better enjoying the articles annexed, or of using them in his trade as chattels, and to remove them at his pleasure.

Under this rule it has been long and well settled that mere utensils or machines or trade devices, being themselves of chattel nature, and capable of being detached without material injury to the freehold or to the chattel, and such as can be set up and used elsewhere, may be removed by the tenant or his vendee during the term. Under this rule it has been held that distillery fixtures, such as copper stills, boilers masoned up in brickwork, etc., could be removed.—*Reynolds v. Shuler*, 5 Cow. (N. Y.) 323. The same rule has been held to apply to an iron tank upon a foundation of brickwork and cement (*Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33); to a steam engine erected by a tenant for years or for life, if for trade purposes (*Lawson v. Polaski County*, 3 Ark. 13; *Haskell v. Manlove*, 14 Cal. 59; *Hey v. Bruner*, 61 Pa. 87; *Kelsey v. Durkee*, 33 Barb. [N. Y.] 410); to iron rails laid by a tenant in a tunnel in a coal mine (*Heffner v. Lewis*, 73 Pa. 302); to casing in an oil well, and a derrick and other appliances used in operating same (*Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95); to a shafthouse and machinery (*Updegraff v. Lesem*, 15 Colo. App. 297, 62 Pac. 342); to a steam boiler, though inclosed in brick masonry (*Kelsey v. Durkee*, 33 Barb.

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[N. Y.] 410; *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33; *Hanks v. Boston & Albany Ry.*, 147 Mass. 497, 18 N. E. 218; to a vault, built on its own foundation, for banking purposes (*Dostal v. McCaddon*, 35 Iowa, 318); and to a safe built therein, too large to be removed without tearing down the vault (*McCall v. Walter*, 71 Ga. 87); to a bowling alley erected by a tenant, including the partitions between the alleys (*Commonwealth v. Morgan*, 107 Mass. 201; *O'Brien v. Kusterer*, 27 Mich. 289); to a corn mill and to machinery running a chair factory (*Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145); to certain railroad iron, frogs, spikes, bolts, etc. (*Northern Cent. Ry. Co. v. Canton Co. of Baltimore*, 30 Md. 347); and also to a scenic railway and to the foundations of brick piers (*Thompson Ry. Co. v. Young*, 90 Md. 278, 44 Atl. 1024).

There are many other like cases, too numerous to mention, to be found cited in notes to Ewell on Fixtures. The following seems to be a very clear statement of the rule and the exceptions in favor of trade fixtures, and is taken from a note in 84 Am. St. Rep. 884: "The general rule at common law that whatever was annexed to the freehold became a part of it seems always to have been subject to an exception in favor of tenants who placed fixtures on property to be used in connection with trade or manufacturing.—*Perkins v. Swank*, 43 Miss. 349. Such right exists even in the absence of a special contract; no such contract being necessary.—*Yater v. Mullen*, 23 Ind. 562. The right to remove is implied from the circumstances.—*Howard v. Fessenden*, 14 Allen (Mass.) 124. Indeed, the consent of the landlord is not necessary to give the tenant the right to remove trade fixtures.—*Andrews v. Day Co.*, 132 N. Y. 348, 30 N. E. 831. Such fixtures remain the personal property of the tenant without the consent of

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the landlord. It has even been held that, where the lease provided that the tenant should not remove 'any repairs, improvements, additions, or fixtures,' such provision was not intended to apply to trade fixtures.—*Cubbins v. Ayres*, 4 Lea (Tenn.) 329. And in *Hey v. Bruner*, 61 Pa. 87, where a tenant covenanted that permanent additions should be left on the property at the expiration of the lease, and to belong to the owners of the premises, it was held that machinery placed on the property by him for the benefit of his business was his personal property. A lease which stipulates that erections or additions placed on the premises shall belong to the landlord on the termination of the lease does not include electrical machinery placed in a leased building for the purpose of furnishing power for an electric light system.—*Liebe v. Nicolai*, 30 Or. 364, 48 Pac. 172."

The rule and the exceptions under discussion have been well stated by this court, as follows: "The general rule of the common law subjected everything affixed to the freehold to the law governing the freehold. This rule never was universal, nor inflexible, nor without exceptions. It was applied most rigorously between executor and heir, in favor of the latter; with more liberality between tenant for life, or in tail, and remainderman or reversioner, in favor of the former; and with still greater generosity between landlord and tenant. An exception in favor of fixtures erected for the purpose of trade seems to have been almost as ancient as the rule itself.—*Elwes v. May*, 3 East's R. 38. The common law of England, however (as has been well remarked by the Supreme Court of the United States), is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them, and adopted, only that portion which was

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applicable to their condition. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The interest of the owner of the soil, as well as public policy, in America, required that erections for agricultural purposes, put upon the land by a tenant, should receive the same protection in favor of the tenant that was extended by the common law of England to fixtures made for the purposes of trade."—*Harkness v. Sears*, 26 Ala. 496, 497, 62 Am. Dec. 742.

The English case of *Elwes v. May*, 3 East, 49, 51, was an action upon the case in the nature of waste by a landlord against his late tenant, who held under a term for 21 years. The land in question was a farm consisting of lands, outhouses, and barns. The tenant had during his term erected at his own expense stables, carpenter shop, carthouse, pumphouse, fuelhouse, etc., the buildings being of brick, mortar, and tiling, with foundations about a foot in the ground. Before the ending of the lease the tenant tore down the buildings he had erected, dug up the foundations, and carried away the material; and the court held that he was liable, upon the theory that the structures were all necessary for the convenient occupation of the farm, which could not well be managed without them. That case is contrasted with, and distinguished from, that of the soap boiler who set such fixtures up as were necessary in his trade, and to encourage industry. This case says that indulgence in favor of the tenant has been carried still further by allowing him to carry away things of ornament, as mantels, wainscoting, and other such fixtures. But this court held at that time that no court had gone to the length of establishing the buildings subservient to purposes of agriculture, as distinguished from those subservient to trade, which had been held removable by

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an executor or tenant for life. But our own case of *Harkness v. Sears*, 26 Ala. 497, 62 Am. Dec. 742, above quoted from, held that this rule had been extended in America, because public policy required that erections for agricultural purposes, put upon the land by the tenant, should receive the same protection afforded by the common law of England to fixtures for the purposes of trade; but held that the general doctrine of the common law of England, so far as respects heirs and executors, was adopted by our ancestors and became a part of the common law of America.

The rule as to trade fixtures of a tenant is thus stated by Lord Kenyon: "The law will make the most favorable construction for the tenant where he has made necessary and useful erections for the benefit of his trade and which will enable him to carry it on with more advantage."

It was likewise decided by Story, J., in *Van Ness v. Pacord*, 2 Pet. 137, 7 L. Ed. 374, that the rule as to trade fixtures had been extended in the United States to agricultural tenants, and that the owner of the soil, as well as the public, had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which would aid this result, and that in the poverty of the country in its beginning, a tenant could not afford fixtures of much expense or value, if he were to lose his whole interest therein by the very fact of erection.

Mr. Justice Story held that the question whether a given article is capable of removal as a trade fixture did not depend upon the form or size of the building, whether it had a brick foundation, or whether it was one or more stories high, but that the only question was whether it was designed for the purposes of trade; that a tenant could erect a large, as well as a small,

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building; that he could erect it one or two stories high, and with such foundation as he chose; and that he would not be liable for waste in tearing down and removing a wooden building, with a stone cellar and a brick chimney, upon a lot of land which he had rented for 20 years for the purpose of carrying on the business of dairyman, and as a residence for his family and servants while so engaged.—*Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374.

This doctrine is stated with approval by Mr. Taylor in his work on Landlord and Tenant, § 546.

This same rule was adopted, if not extended, by the Supreme Court of Massachusetts, which held that tenants were permitted to remove all improvements made for the purpose of trade, when the removal would not injure the inheritance.—*Whiting v. Brastow*, 4 Pick. (Mass.) 410. The rule in regard to the removal of fixtures always requires that they be capable of removal without destruction or serious injury to the freehold, unless there is a contract to remove. But, as before stated, no general rule can be laid down for all cases, such removal depending upon the peculiar circumstances of the case.

After an examination of all these reported cases, and of the text-books, we feel sure that the defendant, Tillis, is not liable in this case for the removal of the trade fixtures in question, unless he could be said to be liable under the particular provisions of the contract of lease.

It is claimed by the appellant that, if it cannot be held that defendant is liable for removal of the fixtures generally, he is liable under the particular, express provisions of the contract. These provisions are contained in sections 3 and 5, as follows:

“Third. At the expiration of this lease the second party agrees that the said first parties shall have the

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right to enter into and upon said lands and repossess themselves thereof, and that all improvements of whatever kind and nature erected upon said lands during the life of this lease shall revert to the first parties hereto, and become their property in fee simple without process of law."

"Fifth. That in the case of failure upon the part of the said second party hereto to pay said rent when the same shall become due, within 30 days thereafter, or to perform any of the other conditions or stipulations of this lease, after having been given 10 days written notice of his failure to do so, by the said parties of the first part, then and in that event, the said land with all the improvements shall revert to, and become the property of, the said parties without process of law."

We do not think that the word "improvements," as used in this lease, was intended by the parties to be given the meaning contended for by appellant in this case. It is true that it is a very general term, and certainly in its ordinary meaning includes fixtures; and, as was said by the Supreme Court of New York (*Mayor's Case*, 16 How. Prac. 220; s. c., 29 Barb. 363), the word "improvements," as used in a lease, should be held to embrace every addition, alteration, or annexation made by the lessee during the demised term, to render the premises more convenient or useful; that the word "improvement" was comprehensive of all fixtures, and it would be difficult to select a more comprehensive word. And in the case of *Brown v. Penry*, 2 Stark, 403, it was held that a covenant to repair and deliver improvements which might be made would include a veranda erected by the tenant, the lower part of which was attached to posts and fixed in the ground. But in the case of *Hey v. Bruner*, 61 Pa. 87, where the covenant was to yield up and surrender the possession of the

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premises, together "with all and every improvement and addition which they (the said lessees) shall construct and make thereon," held, that the tenants had the right to sever and retain trade fixtures, such as a boiler and an engine which was fastened into the foundation of the buildings upon the rented premises, and though the machinery was firmly fixed into the building. The court, in that case, speaking of the provisions of the lease, said: "There is no doubt that the lessor contemplated this machinery to belong to him at the expiration of this lease, but he did not so provide in" it, because "upon a fair reading of" it "there is no doubt the lessee had a right to remove these fixtures and sever them from the freehold" during the lease.

In the case of *Whitney v. Shippen*, 89 Pa. 22-26, the lease provides that "alterations and improvements" made by the tenant shall belong to the landlord, and where the landlord consented to the sale of certain fixtures annexed by the tenant, this showed that the parties had not classed these fixtures as "alterations and improvements."

In the case of *Trenton Brewing Co.*, 56 N. J. Eq. 317, 38 Atl. 861, the lessee covenanted to leave any alterations, repairs, or improvements upon the premises, and that the same should become the property of the lessor. Held, that certain bar fixtures could be removed from the building attached thereto, but that certain gas and electric light fixtures could not be removed, as the latter by their very nature became a part of the realty and the house, while the former were a part of the trade fixtures. The court said: "The presence in the saloon of the bars and their equipment is an improvement in the same sense that a room is improved by chairs, carpets, tables," etc.

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This is one of the fullest and best considered cases that we have been able to find upon the subject; and the opinion therein correctly draws the distinction which we think should be drawn in this case, in determining whether or not the "amusement devices" or trade fixtures which were alleged to have been torn down and removed by the defendant in this case are to be embraced in the provisions of the lease.

In the New Jersey case the bars, partitions, doors, mirrors, and beer pump and pipes were held not to be included in the phrase "improvements made upon the premises," but that a chandelier and gas fixtures were to be included, and in that case the court made the distinction which we think should be made in this case. That court said: "The improvements, to be within the provision [of the lease], must, when made, savor of the realty. The association of the words in the clause of the covenant shows this to be the true meaning. It was 'alterations, repairs or improvements made upon the premises.'" And the word "improvements" did not "include articles which were in their nature chattels"; that "the covenant did not refer to improvements brought upon or placed in the demised premises," but to "improvements made of the premises themselves, which were agreed to be left. * * * The true inquiry is not whether the presence of these things is an improvement of the place in the general sense of the questions asked. The presence in the saloon of the bars and their equipment is an improvement in the same sense that the room is improved by the presence of the chairs, tables," etc. "Such things are improvements to the appearance of the place," and cannot "properly be deemed * * * of that fixed character * * * necessary in order to make them improvements of the real estate or its appurtenances." And it was therefore

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held in that case that it was "the essence of the covenant" that improvements should be "of the demised premises," and that whether they were betterings or improvements of the realty itself depended upon "their essential nature, and the action and intention of the lessee in relating them to the demised premises," and that in order to constitute trade fixtures an improvement upon the premises within the meaning of the lease, the fixtures "must have been actually annexed to the realty and intended to be a permanent accession to the freehold." It was further held in that case that the bar fixtures "were all stock articles, capable of being put into any saloon large enough to hold them," that none of them were "brought upon the premises * * * to be used in the construction of an improvement of the demised premises."

An annexation of chattels merely incidental to the staying of articles not intended to be incorporated into, or to become a part of, the realty, does not make them improvements within the meaning of the lease.

It was held by Chief Justice Beasley (*Erdman v. Moore*, 58 N. J. Law, 461, 33 Atl. 958) that articles claimed to be fixtures in that case could not, by reason of mere physical connection with the land, be deemed such to the extent that they could not be removed by the tenant. All the courts seem to hold that the element of intention is the controlling factor in determining whether additions to real estate shall retain apparent indications that they are still personalty and become incorporated into the realty, and that each case must be controlled by the evidence of annexation and intention exhibited in that particular case, and that the difficulty arises in applying the rule.

Where annexation is of such a character as to indicate the purpose to make the chattels a part of the

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realty, they will be held to have become realty; but, where it does not indicate such an intent, the chattels do not become a part of the realty or 'improvement,' within the meaning of the lease. It seems to be the settled rule that whenever such connections and additions are made solely as a means of staying or fastening the chattels in their places, to be used in the business of the tenant, without the intention to incorporate them into, or to make them a part of, the realty, they are not improvements of the demised premises within the meaning of such covenants of the lease.

A similar construction to that given such covenants by the New Jersey case has been given by the English courts to such contracts. In the case of *Sumner v. Bromilow*, 34 L. J. Q. B. 130, where the covenant was to yield up the premises and to leave at the disposal of the lessor all fixed materials of all kinds that should be used about the salt works, except certain pans, etc., it was held that the effect of such covenant was to prevent the tenants from removing the landlord's fixtures, but that the tenants' fixtures might be removed, a reasonable time being allowed for this purpose.

In the case of *Foley v. Aldenbrooks*, 13 M. & W. 174 (s. c., 14 L. J. [N. S.] Exch. 169), the covenant was to yield up in repair furnaces, dwelling houses, iron works, and all other improvements and alterations to be thereafter erected (except the iron works castings, railways, gins, and the movable implements and materials used in or about the said furnaces, fire engines, pits, and premises). Held, that the rule as to what should be removed by the lessee was that whatever was in the nature of a machine or a part of a machine, as iron work or iron castings or railways or movable implements or materials, the lessees had a right to remove; and that

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whatever was in the nature of buildings or support of buildings the defendant had not a right to remove.

In the case of *Loeser v. Liebmann*, 14 N. Y. Supp. 569, a provision "that all improvements placed in said buildings by the lessee, viz., elevators, boilers, heating apparatus, etc., shall be deemed fixtures not to be removed" was held not to embrace an electric lighting apparatus.

It seems to be the result of all these cases that covenants to redeliver, with all improvements, do not include trade fixtures of the tenant, but do cover all fixtures or improvements of the landlord which were intended, when placed upon the premises, to become a part of, or an improvement of, the freehold.

Construing the lease contract in question, we feel certain that it was never the intention of the parties to this lease, nor that of the subtenants who acquired the interest of the original lessee, that these amusement devices, such as swings, bowling alleys, roller coaster, and "Hale's touring car," brought upon the premises for the amusement of the public, should become a part of the freehold estate, and that they were never considered or treated as improvements of the land itself, but were always understood and treated as chattels or trade fixtures of the tenant.

Surely the tenant, during the life of the lease, could have installed any number of such devices for the amusement of the patrons of the park, and could have removed or changed them at his pleasure and without let or hindrance on the part of the landlord, for the reason that they were of no interest or concern to her. They could not, in any sense, be considered as improvements upon the land when it was rented, or at any other time, except for the purpose of making the resort more attractive—of improving the tenant's trade or business.

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For this reason we agree with the trial court that the plaintiff showed no right of recovery, and hold that the affirmative charge was properly given in favor of the defendant.

Affirmed.

ANDERSON, C. J., and McCLELLAN, SAYRE, and SOMERVILLE, JJ., concur.

Langhorne, et al. v. Simington.

Injury to Servant.

(Decided June 30, 1914. 66 South. 85.)

1. *Master and Servant; Injury to Servant; Employer's Liability Acts.*—Where the employer furnished a superintendent to overlook the progress of the work, and no complaint of his competency was made, the common law duty of the master ended, if it be conceded that the complications and dangers were such as to require a superintendent, and the master was not liable for the negligence of the superintendent except as imposed by the Employer's Liability Statutes.

2. *Same; Obligation of Master.*—It is the duty of an employer to exercise due care to provide a reasonably safe place for employees to work, having regard to the kind of work, and where this duty is delegated to an employee, such employee represents the employer, who is liable for the negligence of the employee in discharging the duty; but the employer's duty of maintaining the safety of the place of work may be discharged by committing its performance to employees carefully selected for competency and fitness.

3. *Same.*—Where the prosecution of the work itself makes the place and creates its dangers, the rule requiring the employer to provide his employees with a safe place to work, is without application.

4. *Same; Negligence of Superintendent.*—Where a superintendent in charge of excavating the earth from a cut was negligent in pushing forward a steam shovel to a point where those engaged in its operation were exposed to danger from defectively finished walls of the cut, such negligence of the superintendent was not negligence in providing a safe place for the employee in which to do his work, and the employer's liability, if any, was under the Employer's Liability Act.

5. *Same; Employer's Liability Act.*—While the Federal Employer's Liability Act enlarges the liability of an employer by curtailing the

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fellow servant doctrine, yet an employer need not do for his employee that which the latter may do for himself for his protection, and where superintendence is entrusted to an employee, who, while acting within the scope of his authority, fails in due care for his subordinate co-employees, a recovery may be had under the statute.

6. *Same; Pleading.*—To state a cause of action under the Employer's Liability Act for negligence of superintendence, the complaint must set out the fact of superintendence and the particulars wherein there has been a failure to exercise due care.

7. *Same; Common Law Liability.*—Where the place where an employee was working when injured was in a reasonably safe condition when he began work, but became unsafe thereafter, the employer was not liable at common law for a failure to furnish a reasonably safe place in which to work.

8. *Appeal and Error; Review.*—Where the complaint contained counts seeking recovery, both under the common law and under the statute, and the court submitted to the jury all the counts, and there was no evidence to support the common law count, a judgment for plaintiff will be reversed, it being impossible to say upon what count the jury based their verdict.

9. *Charge of Court; Cautionary Instructions.*—A refusal to instruct a jury that unless each juror is reasonably satisfied from the evidence that plaintiff has established all the material averments of at least one count in its complaint, the jury cannot find for plaintiff, constitutes reversible error.

APPEAL from Cullman Circuit Court.

Heard before Hon. D. W. SPEAKE.

Action by Henry Simington against E. K. Langhorne and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

The first count alleges that defendants were engaged in excavating and constructing a railroad track for the Louisville & Nashville Railroad Company, and in that connection were engaged in operating a steam shovel for the purpose of making an excavation, and on the date of the accident plaintiff was in the service or employment of defendant, and, while engaged in and about the discharge of his duties in the line of his employment in operating a jack under said steam shovel aforesaid, a large stump or piece of log was negligently caused or negligently allowed by defendant to fall or roll down upon plaintiff from a high embankment (and here fol-

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lows catalogue of injuries), and plaintiff alleges that his injuries and damages aforesaid were caused by reason, and as a proximate consequence, of the negligence of one Wallace Waugh, who was also in the service or employment of defendant in the capacity of walking boss, and who was intrusted by defendant with superintendence, and whilst in the exercise of such superintendence in this, said Waugh, who was in the service or employment of defendant, and who was intrusted by defendant with superintendence, and while in the exercise of such superintendence, negligently caused, or negligently allowed, said stump, piece of log, or other heavy piece of timber to fall from or roll down said embankment aforesaid, and fall upon plaintiff.

Count 2: Same as 1, except Mike Day, who was in the service or employment of defendant in the capacity of engineer, was substituted for Waugh.

Count 3: Same as 1 down to and including catalogue of injuries, and adds:

"Plaintiff alleges that he was injured and damaged as aforesaid by reason of, and as a proximate consequence of, the negligence of defendant in this: Defendant negligently failed to provide plaintiff with a reasonably safe place for plaintiff to be engaged in or about said business of defendant at the time he received said injuries as aforesaid."

The following charges were refused defendant:

Affirmative charge as to the third count.

(14) "The court charges the jury that, if you believe from the evidence in this case that the place where plaintiff was at work when injured was in a reasonably safe condition when he commenced work there, and it became in an unsafe condition after plaintiff commenced work there which proximately caused his injury, you cannot find for plaintiff for failure of defendant to fur-

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nish him a reasonably safe place in which to do his work, as charged in count 3 of complaint as amended."

(27) "The court charges the jury that, unless each of the jury is reasonably satisfied from the evidence in this case that plaintiff has established by evidence all of the material averments of one count of the complaint, you cannot find for plaintiff in this case."

CHARLES A. CALHOUN, for appellant. The court erred in overruling demurrers to the first count, and as amended.—*Woodward I. Co. v. Marbut*, 62 South. 804; *Maddox v. Chilton Warehouse Co.*, 171 Ala. 216. The same infirmities appear in count 2. Count 3 did not present a cause of action under the master's common law duty to furnish a safe place to work. The court should have instructed a verdict for defendant under count 1 of the complaint.—5 LeB. § 1682; *General S. & C. Co. v. Shelton*, 157 Ala. 635; *Hammond v. Ala. C. & C. Co.*, 156 Ala. 253; *Walton v. T. C. I. R. R. Co.*, 166 Ala. 539. The court should have instructed for defendant under count 2 as amended.—*Freeman v. Sloss-Sheffield Co.*, 137 Ala. 485; *Smith v. Pioneer M. & M. Co.*, 146 Ala. 234; *Linderman v. Tenn. Co.*, 58 South. 901. Defendant was entitled to have the verdict instructed under count 4.—4 LeB. § 4546, and cases cited in note. It appearing that the place was safe when the work was commenced, and that if it was rendered unsafe it was done by plaintiff in the prosecution of the work, and hence, no recovery could be had for a failure to provide a safe place.—*Woodward I. Co. v. Cook*, 124 Ala. 349; *Tutwiler C. & C. Co. v. Farrington*, 144 Ala. 167; *Ala. Con. Co. v. Hammond*, *supra*; *Whitmore v. Ala. Con. Co.*, 164 Ala. 125. Charge 14 should have been given on these authorities.

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JERE C. KING, for appellee. Under the facts in this case defendant was liable under its common law duty to furnish a safe place, as well as under the superintendent's clause of the Employer's Liability Statute.—*Ala. C. C. & I. Co. v. Hammond*, 156 Ala. 257; *Bailey M. & S.* 108; *A. G. S. v. Robinson*, in MSS.; *B. R. L. & P. Co. v. Moore*, 148 Ala. 115; *N. Ala. Ry. Co. v. Mansell*, 138 Ala. 564; *G. P. R. R. Co. v. Davis*, 92 Ala. 300; Dresser Employer's Liability Acts, 197.

SAYRE, J.—The first and second counts of the amended complaint proceeded on the superintendence clause of the statute. The third count was framed with the unmistakable purpose of stating a case under the common law. It made mention of no co-employee of plaintiff. It alleged that plaintiff's injury had resulted from the fact that "defendants negligently failed to provide plaintiff with a reasonably safe place for plaintiff to be engaged in or about the said business of defendants."

For plaintiff the evidence tended to show that defendants, as contractors for the Louisville & Nashville Railroad Company, were engaged in excavating and removing the earth from a cut through which the company proposed to lay a line of track. The work was done by means of a steam shovel, the operation of which was committed to employees of defendants. To one side, as the work progressed, a sloping wall or bank about 25 feet high was left, and one day the process of excavating undermined and partially dislodged a stump at the upper edge of the wall or bank so that it toppled over and remained suspended above the place where the steam shovel was being worked. Defendants were working day and night shifts, and during the succeeding night natural causes, without further undermining by the

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shovel, which in the meantime had been moved forward 10 or 12 feet, operated to detach the stump and a considerable volume of earth from the upper edge of the cut, causing it to fall down upon plaintiff where he was at work near the front end of the car or truck which carried the machinery of the shovel, preparing it for further movement forward, and so was brought about the injury of which plaintiff complained. The evidence did not show to what extent, if at all, defendants exercised personal supervision of the work, or whether they had a general manager on the ground, but it did show that defendants had in their service one Waugh, named in the first count of the complaint, and referred to in the evidence as a "walking boss." He was, no doubt, a superintendent in some sort. It may have been inferred also that, in the absence of Waugh, which must have been necessary at times, since his duties carried him to other places, superintendence was committed to Day, named in the second count, whose regular duty, however, was to operate the engine that furnished power to the shovel. It might have been found, further, that Waugh or Day, one or both, were negligent in permitting the work to proceed under the condition created by the suspension of the stump above the shovel, a condition the jury may have found that these superintendents knew, or, in the exercise of due care, should have known.

Construed with reference to the law invoked, the third count of the complaint charged plaintiff's injury to the personal wrong of defendants or of a vice principal for whose wrong defendants are answerable according to the doctrine and postulate of that law. In the evidence, which was addressed to the proposition that defendants were liable for the reason that one or the other of their named superintendents had been derelict

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in the premises, we are unable to perceive any tenable basis for a finding that either of these superintendents, while acting as vice principal for defendants, had been remiss in respect of the common-law duty in general of defendants to furnish to their employees a safe place in which to do their work.

The character of the work in which defendants were engaged may have been such, its complication and danger such, that a reasonable regard for the safety of their employees demanded that superintendents should be appointed to overlook its progress; but, whether so or not, superintendents were furnished, as plaintiff's evidence went to show, and no complaint of their competency or fitness is found in pleadings or proof, and here, for aught appearing, the common-law duty of defendants ended, for these superintendents according to the common law as declared in this state, were fellow servants of plaintiff, and for their negligence defendants were not responsible, except as responsibility has been imposed by the Employers' Liability Statute.—*Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672; *Mobile & Montgomery Ry. Co. v. Smith*, 59 Ala. 245; *Tyson v. South & North Ala. R. R. Co.*, 61 Ala. 554, 32 Am. Rep. 8. We do not speak, of course, with reference to an employer's liability for the nonobservance of common-law duties other than the duty to provide a safe place, or, in some cases, superintendence, because no question about them is raised on the record. It may be that some of our cases—that of *Mobile & Montgomery Ry. Co. v. Smith*, *supra*, for instance—“have gone to the extremest verge of soundness in applying the doctrine of fellow servants to the exemption of the employer from liability” (*Georgia Pacific Ry. Co. v. Davis*, 92 Ala. 313, 9 South. 252, 25 Am. St. Rep. 47); but they have been consistently

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followed.—*Postal Telegraph Cable Co. v. Hulsey*, 115 Ala. 204, 22 South. 854, and cases cited.

That it is the duty in general of an employer to exercise due care to provide a reasonably safe place, having regard to the kind of work involved, in which his employees may do the work assigned to them cannot be denied; and, where this duty is delegated to an employee, as of necessity it frequently must be, the employee to whom it is delegated represents the master or employer in such sense that the latter is liable for his negligence in its discharge.—4 Labatt, Mas. & Ser. (2d Ed.) § 1483. But the duty of maintaining the safety of the place is not absolutely personal to the master, and the rule established by the decisions of this court, in common with others of excellent authority, is that it may be discharged by committing its performance to agents carefully selected for competency and fitness.—*Cases supra*; *Woodward Iron Co. v. Cook*, 124 Ala. 353, 27 South. 455; *Tutwiler C., C. & I. Co. v. Farrington*, 144 Ala. 157, 39 South. 898; *Whitmore v. Ala. Consolidated C. & I. Co.*, 164 Ala. 125, 51 South. 397, 137 Am. St. Rep. 31.

Our reading of the record and the briefs of counsel in this case produces the impression that probably the trial court in refusing to defendants the general charge as to count 3 proceeded upon the idea that the evidence justified a finding that one or the other of defendants' named superintendents was negligent in pushing the shovel forward, as the work progressed, to a point where those engaged in its operation would be exposed to danger from the incomplete or defective finished sides or walls of the cut, and that the space between thus left behind the scoop or dipper of the shovel, and yet occupied by the operative machinery of the shovel, became and was a place provided within the meaning of the

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common-law doctrine on that subject. These superintendents may have been negligent in the respect indicated, but, if so, they were not negligent in providing a place, nor did they act with the authority of vice principals of defendants; and defendants were liable, if at all, under the statutory counts.

It is generally considered that the rule requiring an employer to provide his employee with a safe place does not operate "where the prosecution of the work itself makes the place and creates its dangers."—4 Labatt, § 1518, to which many cases are cited. This exception to the master's specific duty to provide a safe place is based upon reasonable considerations which are thus stated by the Supreme Court of New Jersey: "Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of the work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in the pre-

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cise position of his other fellow-servants.”—*O’Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324, quoted by the Supreme Court of the United States in *Central Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418.

By the statute the master’s immunity by reason of the fellow-servant doctrine has been curtailed; his liability has been enlarged. It is still practically impossible that the master or his superintendent should supervise every detail of the master’s work, it is still unnecessary that the master shall do for his employee that which the employee may do for himself to the better advantage of both, but, if superintendence is intrusted to a co-employee, and it be found, as a fact, having regard for the nature and extent of the superintendence delegated, that the superintending employee, acting within the line and scope of his authority, has failed in due care for his inferior co-employee, there may be a recovery under the statute. But in our system of pleading each count is a separate complaint, the sufficiency of which is to be adjudged upon its own allegations, and to state a case under the statute the complaint must set out the fact of superintendence and the particular wherein there has been a failure to exercise due care, as was done in counts 1 and 2.—*Woodward Iron Co. v. Marbut*, 183 Ala. 310, 62 South. 804.

It results from the foregoing considerations, which inhere in the law of the subject and the substance of the separate counts, that, while the statutory counts 1 and 2 were properly submitted to the jury, defendants were entitled to the general charge requested as to count 3 which proceeded, as we have said, distinctly upon the ground that defendants had failed in some duty imposed upon them by the common law. In that count the allegation is, in effect, that defendants or some vice

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principal of theirs neglected to furnish plaintiff a reasonably safe place in which to work. It must be assumed that plaintiff and his co-employees went to work upon the natural surface of the earth; at least there is no basis for supposing that the place as it stood was unsafe in any respect for which defendants could be held responsible on any principles of law or reason. The danger arose, and could only arise, as the work progressed. It was caused by the work done. In such case defendants were not obliged by any common-law rule of duty to stand by during the progress of the work to see where a danger arose.—*Durst v. Carnegie Steel Co.*, 173 Pa. 162, 33 Atl. 1102. The court, however, in submitting to the jury whether plaintiff had made out a case under the third count, seems to have held otherwise. We cannot know upon what theory or count the jury concluded for the plaintiff, and for the error in submitting the case to them on the third count the judgment must be reversed.

In argument touching the question discussed appellee relies upon *Alabama Consolidated C. & I. Co. v. Hammond*, 156 Ala. 257, 47 South. 248. The counts upon which that case went to the jury were both framed under the statute. Appellee also relies upon *North-cr'n Ala. Co. v. Mansell*, 138 Ala. 564, 36 South. 459. One of the counts in that case proceeded on the common law; but the facts there obviously take the case without the influence of the principles which have controlled our decision in the case at bar.

For the reasons stated above defendants were entitled to charge 14, which was refused to them.

There was error also in the refusal of charge 27 requested by defendant.—*B. R. L. & P. Co. v. Humphries*, 171 Ala. 291, 54 South. 613; *B. R. L. & P. Co. v. Gon-*

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zales, 183 Ala. 273, 61 South. 82; *B. R. L. & P. Co. v. Moore*, 148 Ala. 115, 42 South. 1024.

For the errors indicated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

Birmingham Railway, Light & Power Co. v. Scisson.

Injury to Passenger.

(Decided June 18, 1914. Rehearing denied July 25, 1914.
66 South. 2.)

Carriers; Duty to Passengers; Degree of Care.—The carrier owes to its passengers the duty to exercise the highest degree of care, skill and diligence known to very careful, skillful and diligent persons engaged in a like business, consistent with the practical operation of the business.

APPEAL from Birmingham City Court.

Heard before Hon. JOHN H. MILLER.

Action by Belle Scisson against the Birmingham Railway, Light & Power Company, for damages for injuries sustained while a passenger on one of its cars. Judgment for plaintiff and defendant appeals. Affirmed.

TILLMAN, BRADLEY & MORROW, and BRENTON K. FISK, for appellant. For brief and insistence, see case of *B. R. L. & P. Co. v. Lena Scisson*, 186 Ala. 70, 65 South. 332.

HARSH, BEDDOW & FITTS, and McQUEEN & ELLIS, for appellee. For brief and insistence see *B. R. L. & P. Co. v. Lena Scisson*, 186 Ala. 70, 65 South. 332.

[Mobile & Ohio R. R. Co. v. Brassell.]

DE GRAFFENRIED, J.—In this case the court, at the written request of the plaintiff, charged the jury that: "A common carrier of passengers, by street car, owes to its passengers the duty to exercise the highest degree of care, skill, and diligence known to very careful, skillful diligent persons engaged in like business, consistent with the practical operation of the business."

This charge correctly states the law.—*Alabama Great Southern Railroad Co. v. Robinson*, 183 Ala. 265, 62 South. 813.

2. The other questions presented by this record were determined adversely to appellant in the case of *Birmingham Railway, Light & Power Co. v. Lena E. Scisson*, 186 Ala. 70, 65 South. 332.

There is no error in the record, and the judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ.,
concur.

Mobile & Ohio R. R. Co. v. Brassell.

Nuisance.

(Decided November 7, 1914. 66 South. 447.)

1. *New Trial; Successful Party; Grounds.*—Where a verdict was rendered for plaintiff, the only ground on which he could properly seek a motion for a new trial was that the verdict was inadequate.

2. *Same.*—Under the facts in this case it was the province of the jury to determine whether plaintiff had sustained any substantial damages as the proximate result of the alleged wrong, and hence a verdict in his favor for nominal damages only should not be set aside by the court unless the amount allowed was so inadequate as to plainly indicate that the jury was actuated by passion, prejudice or other improper motive.

[*Mobile & Ohio R. R. Co. v. Brassell.*]

APPEAL from Montgomery Circuit Court.

Heard before Hon. W. W. PEARSON.

Action by William R. Brassell against the Mobile & Ohio Railroad Company, for damages for maintaining a stagnant pool near his dwelling. There was a verdict for plaintiff for one cent, which on motion of plaintiff, was set aside, and a new trial ordered, and defendant appeals. Reversed and rendered.

STENER, CRUM & WEIL, for appellant. Counsel discuss the proposition that defendant is entitled to the affirmative charge, and in support thereof cite *A. C. L. v. Woolfolk*, 59 South. 635. They insist that plaintiff was entitled to no more damages than the jury awarded him, and that there was nothing to indicate any passion or prejudice, or improper motives, and that the action of the court in setting aside the verdict was erroneous.—*Wes. Ry. v. Stone*, 39 South. 723; 26 N. W. 467.

W. H. & J. R. THOMAS and W. R. BRASSELL, for appellee. The damages were entirely inadequate, and the court properly set aside the verdict and awarded plaintiff a new trial under the evidence in the case.—*Arndt v. City of Cullman*, 132 Ala. 540; *Shahan v. Brown*, 60 South. 891; *So. Ry. v. Lewis*, 165 Ala. 555; *Richards v. Daugherty*, 133 Ala. 575; *C. of Ga. v. Windham*, 126 Ala. 560. The action of the trial court in granting a new trial will not be disturbed.—*Cobb v. Malone*, 92 Ala. 630; *Holland v. Howard*, 105 Ala. 538; *White v. Blair*, 95 Ala. 147; see also 141 Ala. 332; 160 Ala. 329; 98 Ala. 598.

ANDERSON, C. J.—Since the verdict in this case was for the plaintiff, the only ground upon which the motion for a new trial, at his instance, could have been granted was that the verdict was inadequate.

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The jury saw and heard the witnesses, and it was peculiarly within their province to determine whether or not the plaintiff sustained any substantial damages as the proximate result of the wrong complained of, and which they found to exist. This being a case where the law provides a trial by jury, the trial court was invested with no right to set aside the verdict for either excessiveness or inadequacy alone, unless the amount allowed by the verdict was so excessive or inadequate as to plainly indicate that the verdict was produced "by passion or prejudice or improper motive."—*Montgomery Light & Traction Co. v. King*, 187 Ala. 619, 65 South. 998; *National Surety Co. v. Mabry*, 139 Ala. 217, 35 South. 698; *Moseley v. Jamison*, 68 Miss. 336, 8 South. 745. While the jury in this case found that the defendant was liable for creating or maintaining a nuisance, the correctness of which finding we need not decide, they were of the opinion that the plaintiff sustained no substantial damages as the proximate result of same, and their verdict as to this last proposition was authorized by the evidence; and we are unable to say that the said finding was produced by passion, prejudice, or improper motive.—*Joyce on Nuisances*, § 498; *Wood on Nuisances*, § 853.

The judgment of the trial court in granting the motion for a new trial is reversed; and one is here rendered overruling same.

Reversed and rendered.

MCCLELLAN, MAYFIELD, and DE GRAFFENRIED, JJ.,
concur.

[Birmingham Railway, Light & Power Co. v. Nalls.]

**Birmingham Railway, Light & Power Co. v.
Nalls.**

Injury to Passenger.

(Decided July 2, 1914. 66 South. 5.)

1. *Carriers; Injury to Passenger; Wantonness.*—Defendant was not entitled to have a verdict directed for it under a count charging wanton or willful misconduct where the jury might have found from the evidence that the conductor of the trailer signalled the movement of the cars and caused the doors to be closed at a time when he knew plaintiff was alighting, and was between the doors in such a situation that to move the cars or close the doors would probably result in injury, and that the conductor's action was characterized by a reckless indifference to the probable consequences of the movement of the cars and closing the doors.

2. *Damages; Instructions; Conformity to Evidence.*—Where damages for loss of time were claimed in the complaint, and there was evidence showing a loss of time by reason of the injury, and the monetary equivalent thereof, defendant was not entitled to a charge that plaintiff could not recover for time lost from work.

3. *Appeal and Error; Review; Damages.*—There being credible evidence and reasonable inferences therefrom upon which the jury might rest the amount awarded, both as to compensation and exemplary damages, the amount of the verdict did not show such passion or prejudice as to require the setting aside of the verdict.

APPEAL from Birmingham City Court.

Heard before Hon. C. C. NESMITH.

Action by W. M. Nalls against the Birmingham Railway, Light & Power Company for damages for injuries suffered while a passenger. Judgment for plaintiff and defendant appeals. Affirmed.

TILLMAN, BRADLEY & MORROW, and T. A. MCFARLAND, for appellant. The judgment was excessive and should be set aside.—Acts 1911, p. 587; *M. & C. R. R. Co. v. Martin*, 117 Ala. 382; *L. & N. v. Anchors*, 114 Ala. 492; *B. R. L. & P. Co. v. Brown*, 150 Ala. 326.

[Birmingham Railway, Light & Power Co. v. Nalls.]

HARSH, BEDDOW & FITTS, for appellee. It is clearly a question for the jury whether defendant was guilty of wanton injury.—*So. Ry. v. Shelton*, 136 Ala. 191; *C. of Ga. v. Partridge*, 136 Ala. 595; *B. R. L. & P. Co. v. Drennen*, 57 South. 879. The court will not disturb the verdict where it is supported by the evidence.—*C. of Ga. v. White*, 175 Ala. 60; *So. Ry. v. Crowder*, 130 Ala. 265.

MCCLELLAN, J.—Action for damages by passenger against the carrier, appellant.

The first count ascribed the injury to simple negligence in and about the service to plaintiff; and the second count ascribed the injury to wanton or intentional misconduct on the part of servants for whose wrong, in this relation, defendant was accountable.

The evidence has been carefully considered; and the conclusion prevails that the defendant was not entitled to the affirmative charge, requested for it, on the second count. It was open for the jury to find that the conductor of the trailer signaled the movement of the cars and caused the doors thereof to be closed at a time when he actually knew that plaintiff was in the act of alighting between the doors, and in such situation as that to move the cars and to close the doors would probably, if not certainly, result in injury to plaintiff; and that this action of the conductor of the trailer was characterized by a reckless indifference to the, at least, probable injurious consequences that would attend the *then* movement of the cars and the closing of the doors thereto. The vital questions under the pleadings were for the jury, and the court well declined to foreclose the inquiries and their solution by the jury.

The evidence also rendered it impossible for the court to say, through instruction of the jury, that the plain-

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tiff's injuries, if suffered to the extent his testimony affirms, were *not* of a permanent character.

So, too, there was no error in refusing to instruct the jury that the plaintiff could not "recover for any time, if any, he lost from work." That was an element of damages claimed in the complaint; and there was evidence tending to show the factum of the loss of time by reason of his injuries and to show the monetary equivalent or measure thereof.

There being credible evidence and reasonable inferences therefrom upon which the jury might rest the amount of the recovery awarded, both as respected compensation and exemplary damages, the amount here given by the jury cannot be said to manifest such passion and prejudice as to allow the annulling of the verdict.

The judgment is affirmed.

Affirmed. All the Justices concur.

International Agricultural Corporation v. Southern Railway Co.

Delay in Delivery of Freight.

(Decided June 30, 1914. Rehearing denied July 25, 1914.
66 South. 14.)

1. *Appeal and Error; Review; Presumption; Finding of Court.*—Where the case was tried by the court without a jury, and both competent and incompetent evidence had been admitted, it will be presumed on review by the appellate court that the court considered only the competent evidence; especially where the finding was what it should have been independent of such incompetent evidence.

2. *Carriers; Goods; Initial Carrier; Liability.*—While under section 5546, Code 1907, an initial carrier is liable for damages to a shipment from negligence of the delivering carrier within the contemplation of the shipping contract, yet such carrier is not liable for damages for the negligence of a carrier to whom the shipment has been deliv-

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ered under a new contract between shipper and such latter carrier, after the shipment had been carried by the initial carrier to the destination fixed by the original contract.

APPEAL from Lauderdale Circuit Court.

Heard before Hon. C. P. ALMON.

Action by the International Agricultural Corporation against the Southern Railway Company, for damages, for delay in delivering goods, and for injury to the goods. Judgment for defendant and plaintiff appeals. Affirmed.

ASHCRAFT & BRADSHAW, for appellant. The owner of goods shipped may change his instructions as to destination and substitute a different place of delivery.—*Melbourn v. L. & N.*, 88 Ala. 443. The owner may waive delivery at one place and accept it at another.—*L. & N. v. Gilmer*, 89 Ala. 534. The acceptance of a portion of the shipment at a place different from that specified in the contract does not discharge the carrier as to the residue.—*Cox v. Peterson*, 30 Ala. 608. Assent to the terms of the bill of lading is not presumed by its acceptance where there is a prior oral agreement with reference to the shipment.—*L. & N. v. Meyer*, 78 Ala. 597.

C. E. JORDAN and O. KYLE, for appellee. A surety for the duty of another has the right to stand on the very terms of the contract he made.—*Moses Bros. v. A. B. & L. Assn.*, 100 Ala. 465. The bill of lading stands on the same basis as other contracts.—6 Cyc. 420; *T. F. M. Co. v. N. Ala. Ry. Co.*, 128 Ala. 167; *A. G. S. v. Norris*, 167 Ala. 311. The change of destination and delivery somewhere else beyond the point of destination in the bill of lading made a new contract.—5 A. & E. Enc. of Law, 214; 6 Cyc. 468; 2 Hutchinson on Carriers, § 660; 71 Am. Dec. 278; 92 Am. Dec. 142; 15 L.

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R. A. (N. S.) 756; *L. & N. v. D. & R.*, 88 Ala. 443; 137 Ala. 446. A suit cannot be maintained on a bill of lading by a stranger to the contract.—*Zimmerman C. Co. v. L. & N.*, 6 Ala. App. 475.

MAYFIELD, J.—This action is by a shipper against the receiving carrier. The complaint declares on a bill of lading issued by the defendant. The shipment was from Florence, Ala., to Lamb's Ferry, on the Tennessee river. The route was from Florence to Decatur, Ala., over the defendant's line of railroad, and thence by independent boat or barge line, on the Tennessee river, to its destination.

The freight was promptly shipped from Florence to Decatur, but there was some delay in delivering to the barge line, but no particular claim for damages is made on account of this delay. While the freight was at Decatur, one Reeder, agent of the plaintiff, who accompanied the shipment, made arrangements with some agents of the barge line to carry the freight on to Locks 1 and 3, on the Tennessee river, which were three to six miles beyond Lamb's Ferry, the destination of the shipment, as shown by the bill of lading which was sued on.

The shipment was fertilizer, and, after it was transferred from defendant's cars to the barge, it was allowed to be without cover and to be exposed to the weather. Here the shipment was rained on and greatly injured, which damage is the basis of the claim for damages here litigated. Some rain fell before the barge reached Lamb's Ferry, but most of the rain fell, and the greater part of the damage accrued, after the shipment left Lamb's Ferry, and while on its way to Locks 1 and 3.

There was no attempt to show the amount of damages on account of the delay in shipping, nor the damages on account of the rain which fell before the ship-

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ment reached Lamb's Ferry; the only attempt was to show the total amount of damages.

The case was tried by the court without a jury. The defendant made request for a special finding of the facts; but the court, for some reason, declined to make such special finding, but found generally for the defendant.

The plaintiff made no request for a special finding, and his exception reserved on account of the court's failure to find the facts, as requested by the defendant, was unavailing.

Plaintiff appeals, and assigns upwards of 80 errors. It would be wholly useless for us to consider these various assigned errors, even if all were insisted upon—which, of course, is not the case. There are two questions, in the present state of the record, which, being decided adversely to appellant, require an affirmance, though all the other questions insisted upon by it were decided in its favor.

The action was on a bill of lading, wherein was a written contract to ship from Florence to Lamb's Ferry. After the shipment was carried to the end of defendant's line, plaintiff's agent made an arrangement with the connecting boat line to carry the freight on to Locks 1 and 3, on the Tennessee river, which were beyond the destination mentioned in the bill of lading sued on, and there make delivery of same.

There was no complaint, nor sufficient evidence to show, that the defendant ever consented to this arrangement—either before or after issuance of the bill of lading. There was an attempt on the part of the plaintiff to show that the defendant did consent, but there was an utter failure so to do. There was offered no competent evidence to show that the defendant did so consent; most of that offered the court expressly ruled

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out as incompetent; and, as the facts were found by the court and not by a jury, we must presume that the court considered only the competent evidence. And especially is this so when, as here, the finding is in accord with what it should have been if illegal evidence was not considered.

The defendant was clearly not bound by the new arrangement or contract, to carry this freight on to Locks 1 and 3, instead of to Lamb's Ferry, as it had contracted to carry it, and for delivery whereat the law makes it liable, though the loss or damage did occur after the shipment had been delivered by it to a connecting carrier. The boat line may be liable under this new contract but the defendant railroad company, which contracted to carry to Lamb's Ferry only, is not so liable.

If the defendant railroad company had undertaken to carry the freight beyond its destination, even without a contract so to do, or under a nudum pactum, and on account of its negligence in so carrying the shipment beyond its destination the damage had occurred, it would then be liable, as was the barge line, and as the railroad company was held to be, in *Melbourne's Case*, 88 Ala. 443, 6 South. 762, and again, in *Smith's Case*, 132 Ala. 434, 31 South. 481; but the defendant in this case did not undertake or agree to so carry beyond the destination, and declined to do so, and was not a party to the agreement to so carry beyond Lamb's Ferry, and did not attempt to so carry. Hence the rule announced in the above cases does not apply. Mr. Hutchinson states the rule to be that the owner cannot change the destination, and require delivery somewhere else, except upon the basis of a new contract, after the carrier has completed his undertaking and carried the goods to the destination first agreed upon.—2 Hutchinson on Carriers, § 660.

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To hold that the initial carrier is bound by the contract which he made with the shipper, and also by all subsequent contracts made between the shipper and all intermediate carriers and the delivering carrier, would be to bankrupt the initial carrier. It is going quite far enough to hold the initial carrier liable for the negligence of the intermediate or delivering carrier, or for the failure of the latter to perform the contract made by the initial or receiving carrier. It is not yet provided by statute that the shipper and the delivering carrier can, by agreement between themselves, bind the receiving carrier by a new contract to which he is not a party, to which he does not consent, and which he does not undertake, but declines, to perform. It is true that section 5546 of our Code requires the initial or receiving carrier to issue a bill of lading, or receipt, to the shipper, and makes such carrier liable to the shipper for the negligence of intermediate or delivering carriers, or for the failure or refusal of such other carriers to perform the contract of shipment; but it does not authorize such other carriers to change that contract of shipment and thereby hold the initial carrier liable either to the shipper or to such other carriers—in other words, does not authorize them to make a contract for the initial carrier. On the contrary, the statute requires that the initial carrier shall make the contract, and that he shall be bound by the contract, though it is to be performed in part by others.

The wisdom and justice of the statute rest upon the fact that, as the receiving carrier is the one with whom the shipper must contract, the former should be liable to the latter.

The statute does not authorize the shipper to contract with the intermediate carrier and thereby bind the latter contrary to the express provisions of the bill of lad-

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ing which he requires it to issue, and to the performance of which the statute holds the initial carrier liable, even where the performance is distributed in part to intermediate carriers and to the delivering carrier.

It appearing in this case without dispute that the shipper and the intermediate carrier materially changed the contract of shipment, and that the initial carrier declined to be bound thereby, no liability was fixed upon the latter by the changed or new contract of shipment.

As there was no claim of, nor attempt to show, any certain amount of damages suffered on account of a failure to promptly deliver to the connecting carrier, when the liability of the defendant ceased because of the change of the contract of shipment to Locks 1 and 3 instead of to Lamb's Ferry, no judgment could be rendered against this defendant in this action, which declared on the bill of lading issued by the defendant and by the terms of which only it was bound. The effect of the agreement between the shipper and the delivering carrier was, in law, to substitute a new and different contract, by the terms of which this defendant was not bound.

For this reason the judgment of the trial court was correct, and must be affirmed, even though we should concede (which we do not) that there were errors in the record, assigned and insisted upon by appellant. The result would and should have been the same if these rulings had been in favor of appellant.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ.,
concur.

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Injury to Servant.

(Decided June 30, 1914. 66 South. 108.)

1. *Master and Servant; Injury to Servant; Notice of Defect.*—Under subdivision 1, section 3910, Code 1907, a master is not liable for injuries to an experienced engineer from the unexpected starting of a stationary engine caused by a leak in a valve in the interior of the engine, where the existence of a defect was not previously known to the master, and there was nothing to charge him with knowledge thereof, although the master had had notice of other defects, and had instructed an expert engineer to remedy same.

2. *Same.*—A request by an engineer to his employer to have a stationary engine overhauled for defects discoverable while the engine was not in use, was not notice of a latent defect discoverable only when the engine was running, within the provisions of subdivision 1, section 3910, Code 1907, so as to render the employer liable for subsequent injuries to the engineer from such defects which were first discovered at the time of the accident, and while the engine was running.

3. *Same; Defective Machinery; Burden of Proof.*—Where the action was under subdivision 1, section 3910, Code 1907, the burden was on plaintiff to prove the existence of the defect, and that it arose from or was not discovered or remedied owing to the negligence of defendant or someone in his employ; and that such defect was the cause of the injury.

4. *Same.*—Where the action was by an engineer for injuries from the sudden starting of a stationary engine due to a leak in the valve on the interior of the engine, the burden was on plaintiff to show that there was something in the manner in which the engine stopped just prior to the accident which showed a defect in the valve which a reasonable inspection could have detected.

(Anderson, C. J., McClellan and Gardner, JJ., dissent.)

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

Action by J. S. Hutchins against the W. R. Flowers Lumber Company for damages for injuries alleged to have been inflicted while in its employ. Judgment for plaintiff and defendant appeals. Reversed and remanded.

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W. L. LEE and W. R. CHAPMAN, for appellant. Count 5 was subject to the demurrers interposed.—*Conrad v. Gray*, 109 Ala. 130; *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; *Laughran v. Brewer*, 113 Ala. 509; *C. & W. Ry. Co. v. Bradford*, 86 Ala. 574; *Tallassee Falls v. Moore*, 158 Ala. 356. The affirmative charge requested by appellant should have been given.—*Going v. Ala. S. & W. Co.*, 142 Ala. 537; *L. & N. v. Campbell*, 97 Ala. 147; *L. & N. v. Davis*, 91 Ala. 487; *M. & C. R. R. Co. v. Askew*, 90 Ala. 5. The burden was on plaintiff to show the existence of the defect, that the master was negligent in not discovering it or remedying it, and that the defect caused the injury.—*L. & N. v. Lowe*, 158 Ala. 393; *N. A. Ry. Co. v. Mansell*, 138 Ala. 562.

ESPY & FARMER, for appellee. Count 5 as amended was unquestionably good, as tested by the former decisions of this court.—*Jackson L. Co. v. Cunningham*, 141 Ala. 206; *St. L. & S. F. Ry. Co. v. Sutton*, 169 Ala. 400; *Pell City M. Co. v. Cosper*, 172 Ala. 536; *West P. C. Co. v. Andrews*, 150 Ala. 374; *So. Ry. v. Davis*, 119 Ala. 573; *Harbison-W. R. Co. v. Ross*, 62 South. 1010; *Shereda v. Warrior-P. Co.*, 62 South. 721; *Yolande C. Co. v. Norwood*, 58 South. 118. The only purpose for which the court may look to the bill of exceptions is to review the action of the trial judge in overruling appellant's motion for a new trial.—*Yolande C. Co. v. Norwood*, *supra*; *McLoud v. Flournoy*, 57 South. 630; *Cassells Mills, et al. v. Strater Co.*, 166 Ala. 281.

DE GRAFFENRIED, J.—The plaintiff, J. S. Hutchins, who is an engineer of 25 years' experience, was injured while at work upon a stationary engine of the Flowers Lumber Company, and sues to recover the damages which he suffered by reason of said injuries. The

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action was brought under subdivision 1 of the Employers' Liability Act.

Our statute provides that the master or employer is not liable under said subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.—Civil Code 1907, p. 602.

The plaintiff claims that his injury was due to a defect in a valve of the engine. It seems that it was the duty of the plaintiff—and this duty, we gather from his evidence, he had been in the performance of for some time before his injury—to start and stop this engine, and, generally, to superintend it. On that subject we quote the following part of the plaintiff's testimony as shown by the bill of exceptions: "On that day I was employed by them, and working for them, as planing mill foreman, and as engineer, and it was my duty to look after the planers and the engines. It was my duty to start and stop the engine and do the necessary work on it, tighten bolts and brasses about the engines, and to screw nuts and tighten up any looseness where it was outside work on the engine. It was not my duty to have anything to do with the work on the inside of the engines if anything got wrong in them. I was engaged at my duties at the plant of the defendant on the 11th of January, 1912. The engine was a stationary engine.' The plaintiff then asked the witness the following question: 'Did it require the time and attention of a man all of the time to run the engine, or did you just start and stop the engine when you were there?' The defendant objected to the question, and for grounds thereof assigned the following: 'Because it was irrelevant,

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immaterial, and illegal.' The court overruled the defendant's objection, and the defendant then and there duly excepted to the ruling of the court. In answer to said question the witness said as follows: 'It did not require all the engineer's time.' The defendant then and there moved to exclude the answer to said question because the same was irrelevant and immaterial and illegal, and because said answer was not responsive to the question and the court overruled the defendant's motion to exclude said answer, and the defendant then and there duly excepted to the ruling of the court. The witness further testified that it was his duty to start and stop the engine, and it was his duty to look after the planers and see that the lumber was properly run through the planers."

The plaintiff further testified that on January 11, 1912, while in the performance of his duties about the engine, he noticed some brasses on the engine which needed tightening; that he stopped the engine, began to tighten the brasses, and while doing that work the engine suddenly started and caught his hand and arm, inflicting painful and permanent injuries upon them. The witness further testified that the injuries were due to a leak in the valve of the engine, but his testimony plainly shows, we think, that at no time before this had he ever noticed any defect in the valve, and that at no previous time had this engine indicated, in any way, that there was a leak in the valve. At any rate, he testified fully in the case, and there was no claim by him that he at any time had noticed anything about this engine which indicated to him that it possessed a valve which was defective in any way. The valve is shown by the evidence to have been hidden from view—it was on the interior of the engine—and such defects are latent defects, discoverable only while an engine is in actual

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operation.—*Owen v. A. G. S. R. R. Co.*, 181 Ala. 552, 61 South. 924.

2. The only way in which the plaintiff undertook to show that the defendant had knowledge of *any* defect—not the claimed defect in question—in the engine was by the following, which we copy from his testimony:

"I had a conversation with Mr. Flowers about the engine about the 23d of December, before I was hurt. I think it was the day before Christmas Eve. We were speaking about shutting down for Christmas holidays, and I went in the office and told Mr. Flowers that the engine was in bad shape and it needed some work done on it. Mr. Lane was sitting in Mr. Flowers' office at the time, and Mr. Flowers turned to him and said: 'Mr. Lane, there is a job for you; get it done while we are shut down.'"

The witness further testified that Lane was, at the time of the above conversation, and of the injury, the head machinist, and all the evidence shows that Lane was a practical, expert engineer.

3. We direct attention to the fact that at the time of the above conversation and at the time of the injury the plaintiff, a skilled engineer, whose duties kept him in proximity to the engine while it was in operation, and who had to start and stop the engine, had not, at any time, himself discovered *any* defect in the *valve*. He not only reported none to Flowers, the general manager of the defendant, but he himself knew none to report. The claimed defect, as we have already said, belonged to that class of defects which are known as latent defects, and had not been discovered by the plaintiff, who had charge of the engine and who was a practical engineer of many years' experience.—*Owen v. A. G. S. R. R. Co.*, *supra*.

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4. The evidence in this case shows without dispute that during the Christmas holidays Lane overhauled the engine. The engine was then run, and gave no indication that there was anything wrong with the valve. The evidence further shows without dispute that since the plaintiff received his injuries the engine has been constantly in use, and that at no time has it since that time indicated in the slightest that there is anything wrong with the valve. This is, then, the case of a stationary engine which, for at least a considerable period of time before the plaintiff's injuries, had been, at the exact spot where the plaintiff received his injuries, in constant operation; the operation being conducted by the plaintiff himself. That was the business of the plaintiff, and nothing had ever occurred, while that engine was thus in constant operation, to indicate to the plaintiff or any other person that there was any defect whatever in the valve. That engine was, while the mill was shut down for Christmas week, overhauled by a competent man, who, as an expert engineer, was capable of discovering and of remedying defects in engines. During this overhauling—and the engine was placed in operation—no defect in the valve was discovered and the engine gave no evidence of such a defect. From the time work at the mill was resumed until the moment of the plaintiff's injuries the engine was at work performing its usual functions, and gave no evidence to the plaintiff or to any other person of any defect in the valve. Since the plaintiff's injuries the engine has been in constant operation, has never been moved from the exact spot of its location at the time of the plaintiff's injuries, and that engine has never, at any time, given any indication to any person that there is anything wrong with the valve. In other words, the plaintiff's injuries came to him—if his testimony is true—by an

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act of the engine which, from the entire *previous* and *subsequent* history of the engine, no one had a right to anticipate, provide against, or expect. It came like a bolt of lightning from a sky which had previously, and has subsequently, appeared to all observers to be a clear sky. While the plaintiff testified—and he is an expert engineer—that, in his opinion, the starting of the engine was due to a defect in the valve all the *facts* show that, if the engine did, in fact, start to running as the plaintiff claims, then that occurrence is one which reasonable human foresight could not have anticipated.

In the case of *Tuck, Adm'r v. Louisville & Nashville Railroad Co.*, 98 Ala. 150, 12 South. 168, this court, through Head, J., said: "It is well settled by our decisions that *proof* of each and all of the following propositions is essential to the right of recovery under this count of the complaint: First, the existence of a defect in the ways, works, machinery, or plant connected with, or used in, the business of defendant; second, that such defect arose from, or was not discovered or remedied owing to, the negligence of defendant, or of an employee charged with the duty of seeing that they were in proper condition; and, third, that such defect was the proximate cause of the injury."

The count which was then under consideration was framed under subdivision 1 of the Employers' Liability Act, the identical subdivision under which the complaint in the present case was framed, and in that case Justice Head called attention to the uniform construction which has been placed upon this subdivision, viz.: "In a case like the present there is no presumption of negligence, and when there is no evidence having tendency to show it no recovery can be had."—*L. & N. R.*

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R. Co. v. Davis, 91 Ala. 487, 8 South. 552; *C. & W. R. R. Co. v. Bradford*, 86 Ala. 574, 6 South. 90.

We advert to the rule declared in the above cases—and they have been uniformly followed—for the purpose of indicating that in the present case we are not dealing with that class of cases in which the *law*, upon evidence of certain facts, raises a rebuttable presumption of defects in machinery or its appliances or of negligence on the part of the defendant or of some of its employees, the onus of rebutting which is, by the law, cast upon the defendant.—*L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *McCary v. Alabama Great Southern R. Co.*, 182 Ala. 597, 62 South. 18. In this case the onus of proving that there *was* a defect in the engine, and, if there was a defect, *then* that it arose from or had not been discovered or remedied owing to, the negligence of the defendant or of some employee of the defendant charged in that behalf, was upon the plaintiff. As this engine had been constantly in use by this defendant, and as the plaintiff's own testimony shows that at no time prior to his injury had anything occurred to indicate that there was a defect in the valve, and as all the evidence shows that since the injury the engine, although in constant use, has never in any way given the slightest evidence that there is, in fact, any defect in the valve, we are of the opinion that the plaintiff failed to submit to the jury any evidence from which they had the legal right of inference that there has ever been a defect in the valve which a reasonable inspection can detect.

It is urged that there is no evidence tending to show that the engine prior to or since the plaintiff's injuries was ever stopped under the same conditions as existed at the time of the plaintiff's injuries. All this may be

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true, but this in no way helps the cause of the plaintiff. This court judicially knows nothing about the valves to engines, and the onus was on the plaintiff to show that there was something in the manner in which the engine was stopped on the occasion named which placed a *test* upon the condition of the valve which its previous operations had not placed upon it, and that a defect in the valve, which a reasonable inspection could have detected, was thereby discovered. In other words, it was the duty of the plaintiff to make out his case, and the absence of evidence on this subject cannot save the plaintiff. Speaking on a subject somewhat similar to the one now in hand, STONE, C. J., speaking for this court, said: "It cannot be supposed that the court is familiar with the mechanical contrivance known as a brake on a railroad car, nor when or how it is liable to become out of repair. Nor can we be presumed to know what causes it to 'stick' or refuse to let loose the pressure which retards the free revolution of the wheels, and, of consequence, the movement of the train. These are not matters either of judicial or of common knowledge. If we were permitted to indulge in conjecture, we would probably find ourselves at a loss to determine whether the brake 'stuck,' or refused to let loose, in consequence of its being too tightly put on, or from some other cause. This was necessarily a question for the jury, if there was evidence bearing upon it. It must be borne in mind that the burden was on the plaintiff to satisfy the jury by proof that there was a defect in the machinery; that the defect existed when the car left Mobile; that it was known to the railroad's employees whose duty it was to look after it, or would have been discovered if the inspector had employed proper diligence; and that that defect caused the plaintiff to fall from the car and to receive the injury he complains of. For, if the defect

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is not proven to have existed, * * * or if it was not discoverable upon careful inspection, or if in fact there was no defect, the plaintiff failed to make out his case."—*L. & N. R. R. Co. v. Binion*, 98 Ala. 570, 14 South. 619.

If there are reasonable tests other than those occurring in its ordinary use to which an engine of the class to which this engine belongs may be subjected in order that a valve in such an engine may be tested as to defects, the evidence in this case wholly fails to show it. The plaintiff is an engineer of many years' experience, and, if such tests exist, he should have told the jury about them. The burden was on him, and if he had done so the jury would have had some tangible evidence upon which to base a verdict. The ordinary man knows less about the valve of an engine—a thing hidden from view—and the functions which it performs than he does about the brakes on a train which are open to ordinary observation and the uses of which are well known.

There is nothing in the case of *Caldwell Watson Foundry & Machine Co. v. Watson*, 183 Ala. 326, 62 South. 859, militating against the above views. In that case this court was dealing with a structural defect. In this case we are dealing with a claimed defect which, it is claimed, arose through long-continued use. The theory of the plaintiff is that, as there was evidence before the jury—the testimony of the plaintiff—that the engine started suddenly, and that as he testified that the sudden starting was due to a defect in the valve, and as he had notified the defendant that "the engine was in bad shape and needed some work done on it," he made out a case for the consideration of the jury. The trouble with the plaintiff's case is that he himself shows by his testimony that if there is a defect in the valve such defect is not one which ordinary inspection can

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detect. He is in the same position as a person would be who testifies that he saw a flash of lightning, and who at the same time rebuts the presumption of clouds by swearing that he was observing the sky and that there were no clouds visible.

5. In addition to the above, the evidence shows without dispute that, when the plaintiff told the defendant's president and general manager that the "engine was in bad shape and needed some work done on it," the engineer, Lane, was present, and that the president and general manager said to Lane, "Mr. Lane, there is a job for you; get it done while we are shut down," during the Christmas holidays. According to the plaintiff's own testimony, therefore, at the moment that he informed the defendant of the fact that the engine was in "bad shape," a competent engineer was employed and directed to overhaul the engine and put it in good shape while the mill was idle during the holidays. The undisputed evidence shows that Lane did overhaul the engine, and that he made repairs upon it. It also shows that he knew of no defect in the valve, and that he knew of no reason to suspect that there was trouble in the valve. Lane told, while on the witness stand, what he did to the engine and what he did not do to it. The only fact that the plaintiff can base a claim upon that this defect was due to the negligence of Lane, is the fact that, if his testimony on that subject is true, the engine suddenly started on the occasion of his injury, and that he testified that, in his opinion, the sudden starting was due to a defect in the valve—a defect which it had not previously, and has not subsequently, shown. The witness was present as a party to this cause when Lane testified. As Lane told *what* he did, the plaintiff, an expert engineer, had the opportunity of showing by his own testimony, if he could do so, that Lane, in doing

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the work which, at the plaintiff's suggestion, he was employed by the defendant to do, was negligent in that he omitted to do something which he should have done or had done something that he should not have done or which he should have done in a different or better way. The burden was on the plaintiff to show negligence, and he undertook in no way to show that Lane did not, in fact, perform the duty which he was employed to perform in a proper and workmanlike manner. But, says the plaintiff, the evidence shows that I told the defendant that the engine was in bad shape and needed repair, and, while I did this, nevertheless, shortly after the holidays, the engine suddenly started, which I, an expert engineer, say would not have occurred but for a defective valve. This, says the plaintiff, shows that Lane did not properly do his work, and renders *this* disputed point a question for the jury. Our reply to this proposition is that the plaintiff has *failed to show, by any testimony*, that there has ever been, in the history of this engine, either before or after the accident, anything indicating that there is anything wrong with the valve of the engine which a reasonable examination and inspection could detect; or that, if anything is wrong with it, then that the *claimed* defect could have been discovered by even extraordinary tests.

"The burden of proof in this case is on the plaintiff; * * * and this is not shifted by proving only the fact of injury from the explosion of the boiler."—*L. & N. R. R. Co. v. Allen*, 78 Ala. 494.

Conceding for the sake of the argument of the plaintiff that there is some peculiar defect in this valve, the plaintiff failed to show that this defect arose from, or was not discovered or remedied owing to, the negligence of defendant or of an employee of defendant charged with the duty of seeing that they were in proper condi-

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tion. If there were practical and usual tests such as are used by persons of ordinary prudence engaged in business similar to that of the defendant, by which this peculiar defect complained of could have been discovered, the plaintiff, an expert engineer, knew of them, and should have offered evidence tending to show such tests. This he failed to do, and an employer is not liable to an employee under section 1 of the Employers' Liability Act for injuries received by him unless the evidence shows negligence on the part of such employer or of an employee charged with the performance of certain duties. We fail to find any evidence tending to show negligence, and for that reason the defendant was entitled to affirmative instructions in its behalf. Indeed, the facts of this case are less favorable to the plaintiff's right of recovery than were the facts in the cases of *L. & N. R. R. Co. v. Binion*, *supra*; *Tuck v. L. & N. R. R. Co.*, *supra*; *L. & N. R. R. Co. v. Allen*, *supra*; and *L. & N. R. R. Co. v. Campbell*, 97 Ala. 147, 12 South. 574.

In *L. & N. R. R. Co. v. Campbell*, *supra*, and *L. & N. R. R. Co. v. Allen*, *supra*, this court announced the proposition, without qualification that, "in the *absence of evidence* that an inspection would have disclosed the defect which caused the injury, the mere failure to inspect will not warrant holding the master liable"; and in each of those cases affirmative instructions were given on behalf of the defendant.

The overhauling which the plaintiff indicated to Flowers should be made of this engine was an overhauling for defects discoverable, not while the engine was in use, but while it was not in use; i. e., while it was shut down for the Christmas holiday. This conversation with Flowers was not in any way calculated to place him or Lane upon notice as to any defect in the valve, a defect discoverable only while the engine was

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running, and the evidence fails to show that from any previous behavior of the engine—although it had been long in use—any indication had been given to the plaintiff, to Flowers, or to Lane, or to any other person, that there was any reason to even suppose that there was a defect in the valve of the engine.

If the plaintiff's injuries are traceable to a defect in the valve of this engine—if the engine, in fact, started suddenly, as he states it did—then the defect is not, as we have already said, by *any evidence* shown to have been such a one as any reasonable inspection could have detected. The Legislature, not the courts, has declared that, for a servant to recover against the master in a case like this, the *burden* of proving, "not only the existence of the alleged defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer and that the defect was the proximate cause of the injury alleged, but also that the 'defect arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the employer or master,' " is on the plaintiff.—*Louisville & Nashville R. R. Co. v. Lowe*, 158 Ala. 391, 48 South. 99, and authorities there collated.

It follows from what we have above said that the trial court, in our opinion, committed reversible error in overruled the defendant's motion for a new trial. The judgment of the trial court is therefore reversed, and the cause is remanded to the trial court for further proceedings in accordance with the above opinion.

Reversed and remanded.

MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., dissent.

[McCray v. Sharpe.]

McCray v. Sharpe.*Personal Injury.*

(Decided November 7, 1914. 66 South. 441.)

1. *Highways; Use; Automobiles; Care Required.*—Independent of the Acts regulating the operation of automobiles, the common law requires the operator of such a machine upon a highway to exercise reasonable care to avoid injuring others travelling along the highway, but, having the right to use the highway in common with such others, such operator is only liable for negligence.

2. *Trial; Sufficiency of Evidence; Objection; Form.*—The sufficiency of plaintiff's evidence to make out a prima facie case after he has rested his case, can only be presented by a demurrer to the evidence, or by a request for the affirmative instruction for defendant, and not by motion to exclude all of plaintiff's evidence.

3. *Same; Reception of Evidence; Objections.*—Where the objection to a question states no ground, such objection is properly overruled.

4. *Evidence; Hearsay; Res Gestae.*—Where the horse which plaintiff and her companion was driving became frightened at the approach of the automobile, throwing them from the buggy, a statement by one S., made after the accident, that he told defendant, who was driving the car, that plaintiff and her companion were coming, and that he should stop, was a mere recital of a past event, and not of the res gestae.

5. *Damages; Personal Injury; Elements; Apprehension.*—While a defendant is liable for the damages naturally and proximately resulting to an injured party, including nervousness, damages cannot be recovered for mere apprehension of a future injury by plaintiff not associated with or resulting from some physical infirmity caused by the injury and continuing with and because of that injury or infirmity.

APPEAL from Hale Law and Equity Court.

Heard before Hon. CHARLES E. WALLER.

Action by Dolly McCray by her next friend against S. C. Sharpe, for personal injury. Judgment for defendant and plaintiff appeals. Reversed and remanded.

BROWN & WARD, and JOSEPH H. JAMES, for appellant. No brief reached the Reporter.

THOMAS E. KNIGHT, for appellee. No brief reached the Reporter.

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MCCLELLAN, J.—Action for damages, by appellant against appellee, for alleged tortious conduct or omission by a driver of an automobile in a public highway, in consequence of which a horse, then being driven by plaintiff, was frightened, injuring plaintiff.

Apart from provisions of the act, approved April 22, 1911 (Acts 1911, pp. 634-650), relative to the regulation, etc., of automobiles operated in this state, common-law principles exact of persons operating such vehicles—capable as they readily are of inflicting injury and damage to persons and property on public thoroughfares—the exercise of reasonable care to avoid injury to others traveling along the highway. Since the operators of automobiles have the right to use the highways in common with other persons otherwise lawfully using the highways, such operators of automobiles are only liable for the consequences of negligence in respect of the enjoyment of the common right stated.—Berry's Law of Autos., § 149; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215 et seq., and note, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; Huddy's Law of Autos, p. 84 et seq. In *Murphy v. Wait*, 102 App. Div. 121, 92 N. Y. Supp. 253, it was said: "The rule of the common law is, and always has been, that while a person might travel the highway with a conveyance or a loaded vehicle liable to frighten horses, yet he must, while doing so, exercise reasonable care to avoid accident and injury to others traveling along such highway."

While reasonable, ordinary care must be exercised, what consists on occasion with that requirement must vary and must depend upon the circumstances of the particular case.—Author., supra.

In section 19 (page 641) of the act before mentioned, it is provided: "A person operating or driving a

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motor vehicle shall, on signal by raising the hand, from a person riding, leading or driving a horse or horses or other draft animals bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction remain stationary so long as may be reasonable to allow such horse or animal to pass, and if traveling in the same direction, use reasonable caution in thereafter passing such horse or animal, provided, that in case such horse or animal appears badly frightened or the person operating such motor vehicle is so signaled to do, such person shall cause the motor of such vehicles to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others."

The complaint as amended contained eight counts. Generally classifying them: Some declared for liability upon initial simple negligence; others upon initial willful or wanton misconduct or omission of the driver or his representative; others as upon simple negligence after the fright of the animal became apparent; and others as upon willful or wanton misconduct or omission after fright of the animal became apparent. A part of the counts ascribe the duty breached to common-law exaction, and the others to the duty imposed upon occasion, by the statute, as quoted above. There being evidence introduced, admitted, in support of material averments of all the counts of the amended complaint, and after plaintiff had concluded the presentation of her evidence, the trial court sustained the defendant's motion to exclude all of the evidence so admitted. Thereupon, in response to evident necessity, the plaintiff took a nonsuit with a bill of exceptions. Patently this was error. The question of the sufficiency of the evidence, fully concluded by the plaintiff, to sustain the burden of proof assumed by the plaintiff in his complaint can only be properly presented by the defendant in one of

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two ways, viz.: (a) Demurrer to the evidence; or (b) the request of the affirmative charge. See concurring opinion of Justice MAYFIELD in *Scales v. Central Iron Co.*, 173 Ala. 646-657, 55 South. 821. The suffering of the nonsuit having been thus erroneously compelled, no question of error without injury arises or could be considered. The method of excluding legal evidence, admitted for the plaintiff, upon motion of the defendant, is essentially, inherently unfair to the plaintiff.

The alleged statement of Pat Sharpe, made after the plaintiff and her companion were thrown or fell out of the buggy, that he told his father (defendant), who was driving the car, that the plaintiff and her companion were coming, and that he (father) should stop, was no part of the *res gestæ* of the acts and event under investigation. It was a mere recital by Pat Sharpe of a past matter. The testimony tended to show that immediately after the injury complained of Pat Sharpe, who was riding with the defendant in the car, came to the place at which plaintiff and her companion and the vehicle went into the ditch by the roadside. One of the issues on the trial was whether defendant saw the plaintiff coming down the road, meeting the automobile, and where, at what distance between the vehicles, that knowledge came to the defendant. The court sustained the defendant's objection to this question propounded by plaintiff's counsel to her: "I will ask you if Mr. Pat Sharpe came down, and that he, Pat Sharpe, stated to you, or to Miss Looney, in the presence of his father, Mr. Sharpe, that he told his father to stop; that you were coming down the road."

The objection to the question stated no grounds. This question had in elements that suggested, on its face, the bases for an implication unfavorable to defendant if he did not respond, in denial or explanation, to the mat-

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ter the question assumed to disclose, as having taken place in the defendant's presence. Admissions by silence have, in proper cases and under proper limitations, an evidential value and effect. The objection *as made* should not have been sustained.—Jones on Ev. (2d Ed.) § 289; 1 Encyc. of Ev. p. 367; *Davis v. State*, 131 Ala. 10, 16, 17, 31 South. 569, among others.

The defendant, if found responsible for a damnifying tortious act, was liable for the damages naturally and proximately resulting therefrom to the injured party. If the fall from the buggy produced a *nervous condition*, and that condition continued, compensation therefor was due to be made by the guilty agent. But we are of the opinion that evidence is not competent to show mere apprehension, such as appears to have been the purpose of the testimony sought in this connection to be introduced, on the part of the injured party when subsequently riding in vehicles on public roads, an apprehension not associated with or resultant from some physical infirmity caused by the injury and continuing with and because of that physical injury or infirmity.

We have avoided any consideration of questions not presented on this appeal, as well as any discussion of the evidence in view of the fact that another trial may follow:

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

SAYRE, DE GRAFFENRIED, and GARDNER, JJ., concur.

[Montgomery Light & Traction Co. v. Riverside Company.]

Montgomery Light & Traction Co. v. Riverside Company.

Damage to Team.

(Decided November 7, 1914. 66 South. 459.)

Appeal and Error; Review; Discretion of Trial Court; New Trial.—Where the charge of the trial court was calculated to mislead, and on that ground the trial judge awarded a new trial, his action will not be reviewed on appeal; his action evidencing the fact that in his opinion the charge did mislead the jury.

APPEAL from Montgomery City Court.

Heard before HON. GASTON GUNTER.

Action by the Riverside Company against the Montgomery Light & Traction Company, for damages to wagon and team. There was judgment for defendant which was set aside on motion of plaintiff, and defendant appeals. Affirmed.

RUSITON, WILLIAMS & CRENSHAW, for appellant. The giving of the charges was without injury, if error. Rule 45, Sup. Ct. Pr. 29 Cyc. 654; 81 S. W. 566; 73 S. W. 1073. There was no error in giving charge 12.

HILL, HILL, WHITING & STERN, and R. T. RIVES, for appellee. The granting of a new trial was within the discretion of the trial court, and the fact that he did grant it was evidence of his opinion that the charges did mislead, and hence, the new trial was properly granted.—*So. Ry. v. Jones*, 143 Ala. 325; *B. R. L. & P. Co. v. Ryan*, 148 Ala. 69; *B. R. L. & P. Co. v. Clark*, 41 South. 829; *Randall v. B. R. L. & P. Co.*, 158 Ala. 532.

MAYFIELD, J.—This action was by appellee against appellant, to recover damages to a wagon and team of

[*Ex Parte Whaley, in re City of Bessemer v. Whaley.*]

mules, the result of a collision with one of appellant's street cars. The trial resulted in a verdict for the defendant street car company, which verdict was set aside on appellee's motion; and from the judgment so setting aside the verdict, and awarding a new trial, appellant appeals.

The trial court granted the new trial upon the ground that he had erroneously instructed the jury, at appellant's request, as to the doctrine of contributory negligence. At best these charges were calculated to mislead the jury, and we will not reverse the court for granting the new trial, if, in his opinion, the charges did so mislead the jury.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

Ex Parte Whaley, in re City of Bessemer v. Whaley.

Injury from Defective Street.

(Decided July 25, 1914. 66 South. 145.)

1. *Parties; Objection.*—Under section 1274, Code 1907, an objection that some person or corporation should have been joined with the city as a defendant, but had not been, should be presented by a motion for non-suit, and not by a demurrer.

2. *Same; Waiver.*—Where the city fails to move for a non-suit for want of a proper party defendant under section 1274, Code 1907, and pleads to the complaint instead, it waives its right to object to non-joinder of parties defendant.

3. *Municipal Corporation; Defective Sidewalk; Injury; Evidence.*—Where the complaint alleges that the city officers failed in their duty relative to the sidewalks, city ordinances relating to such duties are admissible in evidence.

CERTIORARI to Court of Appeals.

[Ex Parte Whaley, in re City of Bessemer v. Whaley.]

Mrs. S. B. Whaley sued the city of Bessemer for damages for personal injury because of a defective sidewalk, and had judgment, which judgment on appeal to the Court of Appeals was reversed and remanded. She now brings certiorari to review the judgment and decision of the Court of Appeals. Writ granted.

See *City of Bessemer v. Whaley*, 10 Ala. App. 569, 65 South. 691.

ESTES, JONES & WELCH, for appellant. Counsel uses the same argument in support of the petition for certiorari as was used by them as counsel for appellee in *City of Bessemer v. Whaley*, 10 Ala. App. 569.

L. HERBERT ETHRIDGE, for appellee. Counsel used the same argument as that used in a former report of this case in *City of Bessemer v. Whaley*, 10 Ala. App. 569.

DE GRAFFENRIED, J.—Undoubtedly the complainant in this case makes out a cause of action against the city of Bessemer.—*City of Bessemer v. S. B. Whaley*, 10 Ala. App. 569, 65 South. 542.

It is claimed that some of the counts of the complaint show that other persons besides the city of Bessemer participated in the creation of the nuisance which proximately caused the plaintiff's injuries. If so, upon an appropriate motion, under the terms of section 1274 of the Code, the plaintiff might, after having been given an opportunity to make such other persons defendants, and having failed to do so, have been nonsuited. This section declares that: "The injured party, if he sues the municipality for damages suffered by him, shall also join such other person or persons or corporation so liable as the defendant or defendants of the suit, * * * and if an action be brought against the city or town

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alone and it is *made to appear* that any person or corporation ought to be joined as a defendant in the suit according to the provisions in the preceding section, the plaintiff shall be nonsuited, unless he amends by making such party or corporation a defendant," etc.

In this case there was no motion for a nonsuit, and, as the above statute, by its terms, provides its own penalty for a violation of its terms, the demurrer to the complaint on the ground indicated in the last opinion of the Court of Appeals should have been overruled.

The complaint, as we have already said, makes out a good cause of action against the city. The plaintiff's right of action came to her not merely from the statutes which define her rights. Her right of action came to her from the principles of the common law. If, for the protection of the city, the plaintiff should have made some other person a defendant, then the statute itself plainly indicates the methods—the only methods, because they are of statutory creation—which should have been adopted to bring in such other person as a party defendant. As this right of the city is one purely of statutory creation, the remedy provided by the statute for the enforcement of the right must be strictly followed, as it is exclusive.—*Logan v. Barclay*, 3 Ala. 361; *Murphy's Adm'r v. Br. Bank at Mobile*, 5 Ala. 421, 465; *Taliaferro v. Lane*, 23 Ala. 369; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785; *Nicrosi v. Roswald*, 113 Ala. 592, 21 South. 338.

It may be that, if the city had made the motion for the nonsuit, the plaintiff would have shown, as a reason why such motion should not have been granted, some statutory excuse for making only the city a defendant to the suit. Section 1274 of the Code of 1907, which provides for the nonsuit, also provides that: "If the injured party shall, before bringing suit, demand of the

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mayor of such municipality the name of such other person or persons or corporation as may be liable jointly with the said municipality to such injured party, and if such mayor fail to furnish, within ten days from the making of such demand, the name of such person or persons or corporation so jointly liable, the said injured party shall not be required to join such other person as a party defendant with said municipality in any suit brought to recover damages for such injuries.'

It may be that, if the proceedings looking to a nonsuit had been taken, the plaintiff would have shown that she had complied with the last above quoted provision of the Code, and that, therefore, there was not only no reason for a nonsuit, but no reason for a stay of the proceedings until the other persons could be made defendants.

At any rate, the defendant did not see proper to apply for a nonsuit, but pleaded to the complaint, and in doing so waived any legal right secured to it by the above statute in so far as a nonjoinder of parties defendant is concerned.

The ordinances to which the Court of Appeals refer in their opinion were a part of the laws of the city of Bessemer, and related to the duties of certain officers of said city relative to the sidewalks of the city. As the gravamen of the complaint challenged the performance by the officers of the city of their duties relative to said sidewalks, the ordinances were admissible and relevant. Certainly the plaintiff had a right to show that, under the ordinances of the city, there were officers who were charged with the duty of keeping the sidewalks in proper condition, and then, by other evidence, show that they had failed to perform that duty.

The last opinion of the Court of Appeals is not in accordance with the above views. The judgment of the

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Court of Appeals is therefore reversed, and the cause is remanded to that court for further proceedings.

Reversed and remanded. All the Justices concur.

Watters v. Ezell.

Trespass.

(Decided November 7, 1914. 66 South. 443.)

1. *Trespass; Issues; Title.*—Where a plaintiff claimed title by perfected adverse possession to land which was in the actual possession of defendant, who also claimed by adverse possession, the issue of plaintiff's title was direct and not merely incidental, for the purpose of showing constructive possession, and he could not, therefore, maintain trespass, but is remitted to his action in ejectment.

2. *Trespass; Evidence; Possession.*—The evidence examined and held not sufficient to show that plaintiff was in actual possession of certain unenclosed, swampy woodland at the time defendant cut timber therefrom.

APPEAL from Choctaw Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

Action by Charles T. Ezell against John A. Watters, for damages for trespass to realty. Judgment for plaintiff and defendant appeals. Reversed and remanded.

R. P. ROACH, STEVENS, LYONS & DEAN, and OSCAR L. GRAY, for appellant. Under the evidence in this case defendant had actual adverse possession of said land which had continued for more than thirty years at the time of the trespass.—*Black v. Tenn. C. I. & R. R. Co.*, 93 Ala. 111; *Burkes v. Mitchell*, 78 Ala. 73; *Ala. St. L. Co. v. Matthews*, 168 Ala. 206; *Doe ex dem. v. Edmondson*, 127 Ala. 464. The evidence nowhere brings the plaintiff within the class of one having possession.—*Zimmerman M. Co. v. Dunn*, 163 Ala. 276; *Jackson L. Co. v. McCreary*, 137 Ala. 282. Plaintiff was remitted to

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the action of ejectment as a personal action cannot be substituted therefor.—*Cooper v. Watson*, 73 Ala. 255; *Lee v. Raiford*, 54 South. 547. The legal fiction of constructive possession exists only in the absence of actual possession.—*Wood L. Co. v. Williams*, 157 Ala. 76; *So. Ry. v. Hall*, 145 Ala. 227.

MCDANIEL & WHITFIELD, for appellee. Bare possession authorizes recovery of damages for wrongful interference therewith.—§ 2454, Code 1907. The evidence discloses that those through whom defendant claims often stated that they did not own the land, and acknowledged the title of Mrs. Johnson, and were never in possession. If this be true their conveyance was void as to the adverse possessor.—*Murray v. Hoyle*, 92 Ala. 569. It is competent to show by parol evidence statements of facts within the personal knowledge of the witness concerning land.—*Barron v. Barron*, 122 Ala. 194; *Doe ex dem v. Edmondson*, 127 Ala. 461.

McCLELLAN, J.—The plaintiff, appellee, was accorded a judgment for \$10 damages, as found by the jury, for trespass by the defendant, appellant, upon lands described in the complaint and for cutting and removing timber therefrom. Neither party litigant was able to trace his asserted title or right back to the government.

Taking a view of the facts of the utmost favor to the plaintiff, the controlling issue on the trial was this: In which of the parties litigant had adverse possession, under color of title, effected to vest the title to the land? The act and result of the alleged trespass by the defendant was so far indisputably established as to hinge the right vel non of the plaintiff to recover upon the inquiry whether the plaintiff had acquired title to

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the land, whereupon to predicate a finding that defendant's act in the premises was a trespass.

It is, of course, established doctrine that a transitory action of the nature of that instituted by this plaintiff cannot be substituted for the action of ejectment, with the consequence that a *direct* inquiry into the title to land may be had and the ascertainment of the repository of the title may be effected.—*Pearce v. Aldrich Mining Co.*, 184 Ala. 610, 64 South. 321; *Lee v. Raiford*, 171 Ala. 124, 137, 54 South. 543. It is manifest from the evidence that these parties had each made claim of ownership of the land in controversy. Under the plaintiff's theory, the assertion and prevalence of his right to recover rendered it necessary for him to show an adverse possession adequate to his theretofore perfected investment with the title to the land. From his viewpoint there was no other issue to be solved by the court. The dominant, dominating inquiry being one of title, it could not be affirmed that the stated inquiry was only *incidental*, and not *direct*, within the accepted doctrine of our cases.—*Cooper v. Watson*, 73 Ala. 252, 254, et seq.; *Lee v. Raiford*, *supra*; *Pearce v. Aldrich Mining Co.*, *supra*. It cannot be contended under the evidence that plaintiff was in the *actual* possession of the land at the time the alleged trespass was committed. His possession at that time must have been, if existing, of a constructive nature only, predicated of title in him, which, in turn, depended upon title vel non theretofore perfected by adverse possession by him, or by those to whose rights he claims to have succeeded.

The declaration of plaintiff's witnesses that plaintiff, or those through whom he claims, was or were "in possession" of this uninclosed, swampy woodland; that plaintiff and those through whom he claims asserted, upon occasions, that he or they were "in possession" of

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such lands; that taxes were paid by plaintiff and his predecessors in claimed right; and that occasional entries on the land were made by plaintiff and by those through whom he claims—were insufficient to establish plaintiff's *actual* possession of the land at the time the alleged trespass was committed.—*Zimmerman v. Dunn*, 163 Ala. 272, 50 South. 906; *Reddick v. Long*, 124 Ala. 260, 267, 27 South. 402; *Chessen v. Harrelson*, 119 Ala. 435, 24 South. 716. The undisputed evidence is that defendant was in actual possession of the land in question at the time of the alleged trespass. The title to the land in the complaint must be determined; if at all, between these parties, by the appropriate action of ejectment. The affirmative charge was, therefore, erroneously refused defendant.

All other questions are necessarily unimportant in this action. The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ.,
concur.

Sellers & Orum Co. v. Hardaway, et al.

Destruction of Mortgage Lien.

(Decided November 7, 1914. 66 South. 460.)

Mortgages; Validity; Crops.—Where, at the time of the execution of the mortgages, the mortgagor has no valid lease of the land where the crop was to be grown, but was merely negotiating for the lease, the mortgage upon the crops to be grown was not valid as the crop at that time had no potential existence.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

[Sellers & Orum Co. v. Hardaway, et al.]

Action by the Sellers & Orum Company against J. H. Hardaway and others, for damages for the destruction of a mortgage lien. Judgment for defendants and plaintiff appeals. Affirmed.

WEIL, STAKELY & VARDAMAN, for appellant. A mortgagor need not have an interest in the land at the time of the exception of the mortgage if he shall have made an arrangement or understanding with the owner of the land on which he can base a reasonable belief that he will acquire an interest in the land.—*Hearst v. Bell*, 72 Ala. 336; *Young v. Hall*, 58 South. 789. The several instruments executed at the same time and as a part of the same contract should be construed together.—*Chambers v. Marks*, 9 South. 74; *Commercial Bank v. Crenshaw*, 15 South. 741.

WALTON H. HILL, for appellee. The most that McBride had at the time of the execution of the mortgage was a hope or expectancy, and hence, the mortgage was not valid.—*Paden v. Bellenger*, 87 Ala. 576; *Burns v. Campbell*, 71 Ala. 288; *Christian Co. v. Michael*, 121 Ala. 87; *Windham v. Alexander*, 156 Ala. 341.

McCLELLAN, J.—Repeated decisions in this court have established the doctrine that it is essential to the effectual creation of a mortgage on crops to be grown—“that its subject-matter should have a potential existence, as distinguished from a mere possibility, or expectancy on the part of the contracting parties, that it will come into being. While the thing itself need not have identity, or separate entity, yet it must at least be the product, or growth, or increase of property, which has at the time a corporeal existence, and in which the mortgagor has a present interest, not a mere belief, hope, or expectation that he will in future acquire such

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an interest.”—*Paden v. Bellenger*, 87 Ala. 575, 6 South. 351; *Burns v. Campbell*, 71 Ala. 271, 288; *Windham & Co. v. Stephenson & Alexander*, 156 Ala. 341, 47 South. 280, 19 L. R. A. (N. S.) 910, 130 Am. St. Rep. 102.

This is an action by the assignee of a mortgage against the purchaser of cotton from a tenant, and grounds the complaint upon the destruction of the asserted lien of the mortgage; the instrument having been, previous to the purchase, seasonably recorded in the county wherein the wrong alleged was committed. The contention of the defendants is that at the time the mortgage in question was executed the mortgagor had no such interest in the lands mentioned therein as could render the subject of mortgage the crops *to be* grown thereon. The court below approved this contention, which conclusion cast the result against the plaintiffs (appellants). Our view is that the ruling of the trial court was well made. The evidence bearing on this inquiry is as follows:

James McBride, witness for the plaintiff, being duly sworn, testified as follows: “My name is James McBride, and I reside in Elmore county, Ala., on a part of what is known as the ‘Smith Place’ in Elmore county, Ala. I lived on this same land during the year 1912 and worked said land on shares with one Robert Wilson, who rented said lands from Mr. Smith, the owner of said Smith Place. Some time in December, 1912, I went to said Robert Wilson who had rented said lands for the year 1913 from said Mr. Smith, and I told said Robert Wilson that I wanted to subrent from him for the year 1913 the lands that I had been working on shares with him for the year 1912. He told me that he would subrent me said lands if I would furnish a mule and make arrangements with some one for advances to make my crop for the year 1913. I then secured a mule,

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and on the 27th day of December, 1912, executed to C. E. Goodman, for the purpose of securing advances to make my crop for the year 1913, the following described note and mortgage hereinafter set out. * * *

The mule named in said mortgage was the mule which I had secured to work my crops for the year 1913. At the time said note and mortgage were executed, I had gathered my 1912 crop, and had marketed same and said note and mortgage were made by me for the purpose of securing advances with which to make and market my 1913 crop, and it was so understood by the said C. E. Goodman. About the 1st of February, 1913, I went to said Robert Wilson, and told him that I had secured my mule and had made arrangements for advances for the year 1913, and he then subleased to me for the year 1913 the lands on which I am now residing, viz., said part of said Smith Place which I had worked on shares with said Robert Wilson during the year 1912. I then planted and made my 1913 crop on said lands. After I had gathered my crop of cotton made from the lands which I had so rented from said Robert Wilson, I delivered seven bales of said cotton to the defendants in this case about October 15, 1913. The value of said bales of cotton so delivered by me to the defendants amounted to \$450. The defendants in this case reside in Montgomery county, Ala., and said bales of cotton so received by the defendants from me were delivered to the defendants in Montgomery county, Ala."

It is clear from this evidence that at the time of the execution of the mortgage, viz., December 27, 1912, no contract or binding engagement existed between McBride and Wilson, for the renting, by the former from the latter, of land which the latter had rented from Smith. Up to February 1, 1913, the matter rested, at most, in negotiation. McBride proposed to rent from

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Wilson, but Wilson did not accept his proposal. On the contrary, he replied by fixing conditions which ex vi termini postponed the effectuation of an engagement until a later occasion, an occasion that came on February 1, 1913, some weeks subsequent to the date of execution of the mortgage.

The insistence for appellant cannot be accorded support by *Hurst v. Bell*, 72 Ala. 336, 340-341. In *Fields v. Karter*, 121 Ala. 329, 333, 25 South. 800, the pertinent feature of *Hurst v. Bell*, *supra*, was pointedly criticized; and, when the presently pertinent observations in *Hurst v. Bell* are considered in connection with earlier and later decisions on the subject, they appear to be distinctly out of line. The decision of the court of appeals in *Young v. Hall*, 4 Ala. App. 603, 58 South. 789, expressed no departure from the doctrine of the cases first cited in this opinion.

The mortgagor not having had, on December 27, 1912, such an interest, as the result of rental contract, in the land then rented by Wilson as would afford subject-matter for the mortgage in question, it was a nullity, and, in consequence, fixed no lien in favor of Goodman or his assignee, the appellant, that could be the subject of wrongful destruction by the appellees.

The judgment is therefore affirmed.

Affirmed.

SAYRE, DE GRAFFENRIED, and GARDNER, JJ., concur.

[Helms v. Central of Georgia Railway Co.]

Helms v. Central of Georgia Railway Co.

Death Action.

(Decided November 7, 1914. 66 South. 470.)

1. *Railroads; Persons on Track; Unlawful Speed.*—Where the recovery was sought on the theory of discovered peril alone, the running of a train which ran down plaintiff's intestate at an unusual rate of speed, furnishes no basis for liability.

2. *Same; Evidence.*—Where it was sought to charge a railroad with negligence on the theory that it wantonly ran its train at an unusual rate of speed, evidence that a large percentage of the travellers use the railroad tracks as a highway, is not admissible for the purpose of showing that the railroad company should have anticipated the presence of persons on the track; there being no showing as to the number of travellers in that vicinity.

3. *Same; Wanton Negligence.*—Where those in charge of a passenger train which ran down a trespasser were not guilty of simple negligence after discovering his position of peril, they could not be guilty of willful negligence after discovery of danger.

4. *Witnesses; Examination; Competency.*—A witness present with the deceased at the time he met his death on the track, who had testified to the circumstances surrounding the accident, was competent to testify that he had detailed to the jury circumstances of the casualty.

5. *Appeal and Error; Harmless Error; Pleading.*—Where the counts which were in, were amply sufficient to present any theory of the case which might be formulated under the evidence, it was harmless error to strike other counts of the complaint.

6. *Same; Evidence.*—Where the verdict was for defendant, no error can be predicated for plaintiff upon rulings on questions of the age of deceased.

7. *Same; Review; Verdict.*—Verdicts rendered on conflicting evidence are conclusive on appeal.

8. *Trial; Argument of Counsel.*—Where the son of deceased had testified to facts showing that the company was free from liability for the death of his father, it was not error for counsel of the company to ask in his argument what the administrator was endeavoring to do, although the intimation was that he was attempting to recover a money judgment against the company; such being the obvious purpose of the administrator.

APPEAL from Houston Circuit Court.

Heard before Hon. H. A. PEARCE.

[Helms v. Central of Georgia Railway Co.]

Action by A. E. Helms, as administrator of the estate of E. D. Hobbs, deceased, against the Central of Georgia Railway Company, for damages for the death of his intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

The first count is based on the negligence of the servants or employees operating the train in failing to ring the bell and blow the whistle at a street crossing. The second count was based on the same negligence, with the added duty on the part of the agent or employee to keep a lookout ahead for pedestrians at the time and place plaintiff was killed. The third count sets out that plaintiff's intestate was in full view of defendant's employees operating said train 200 yards before the train reached and struck plaintiff's intestate, and that within that distance the employees in charge of said train could have stopped and should have stopped said train before it struck plaintiff's intestate, but plaintiff's intestate was deaf, the train was running at an unlawful rate of speed, more than 25 miles an hour, and that defendant's employees failed to ring the bell or blow the whistle. The fourth count is the same as the third. The fifth count is based on the same statement of facts as the third, and alleges wantonness or reckless indifference of the employees operating defendant's train. The sixth count is the same as the fifth. Other counts were added by way of amendment alleging the same state of facts, but all based on wantonness or willfulness, or indifference to consequences in running a train in a populous section at a high and dangerous rate of speed without keeping a proper lookout, or without ringing the bell or blowing the whistle. Counts C and B are based on subsequent negligence after discovery of peril, each stating practically the same facts as those set out above.

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The first seven assignments of error are based on the sustaining of demurrers to the original complaint, and each count thereof. Defendant filed pleas 2, 3, and 4 to counts A, B, C, D, and E of the complaint. These pleas set up the fact that plaintiff was a trespasser, and by his own negligence in being and remaining upon the track was struck and injured. The pleas further allege that the place of the injury or the place where plaintiff placed himself upon the track was at a point 300 yards west of a public road crossing, and on a curve in the roadbed and track of defendant in a cut; that plaintiff was intoxicated; that the servants and agents of defendant in charge of the train were not aware of the presence of intestate on the track until within 75 yards of where the accident occurred, and they did everything known to the skill of engineers to avoid and prevent the accident; and that the injury would not have occurred if intestate had not placed himself on the track, or if he had left the track before the train struck him, which he had ample opportunity to do. The eighth, ninth, and tenth assignments of error complain of the overruling of demurrer to these pleas. The eleventh assignment is that the court erred in excluding the answer of the witness:

“Well, I cannot say just how fast it was running, but it was running faster than I ever rode on it before.”

The twelfth assignment is as to the refusal to permit plaintiff to ask the witness the question calling for the answer set out in the eleventh assignment.

B. G. FARMER, for appellant. The court erred in giving the affirmative charge for defendant as to count A.—*So. Ry. v. Stewart*, 60 South. 927; *B. R. L. & P. Co. v. Jones*, 153 Ala. 167. The court erred in giving the affirmative charge to count B.—*Bir. So. v. Fox*, 167 Ala. 218; *Haley v. K. C. M. & B.*, 113 Ala. 650. The same is

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true with reference to count E.—*A. G. S. v. Guest*, 136 Ala. 348. The court erred in not excluding remarks of counsel objected to.—*DuBose v. Connor*, 1 Ala. App. 456; *Ridgell v. State*, 1 Ala. App. 94.

B. F. REID, for appellee. No brief reached the Reporter.

DE GRAFFENRIED, J.—This case, in many ways, is similar to the case of *Blackmon v. Central of Georgia Ry. Co.*, 185 Ala. 635, 64 South. 592. In so far as the facts bearing upon the question of wantonness are concerned, such as the speed of the train, the lookout maintained by the operatives in charge of the locomotive, the ringing of the bell, the blowing of the whistle, the stoppage of the train, and the use by the public of the track at the point of the injury, the questions presented by this record and that by the record in *Blackmon v. Central of Georgia Ry. Co.*, *supra*, are for all practical purposes entirely similar. In *Blackmon v. Central of Georgia Ry. Co.*, *supra*, this court twice declared that, under the facts, the defendant, Central of Georgia Railway Company, was entitled, as to the wanton counts in the complaint, to affirmative instructions in its favor.

The trial court, in the instant case, was of the opinion that, under the evidence, the defendant was, in so far as the wanton counts in the complaint were concerned, entitled to affirmative instructions and gave such instructions to the jury in its behalf. Upon the authority of *Blackmon v. Central of Georgia Ry. Co.*, *supra*, the trial court was free from error in treating this case as one involving only the question of liability growing out of the doctrine of subsequent negligence. This being true, we must treat this case, in so far as the other questions presented by the record are concerned, as if it had been

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originally instituted upon the sole theory that the claimed liability of the defendant arose out of an alleged actionable act of subsequent negligence on the part of the defendant, its agents or servants.

1. It follows, therefore, that it does not matter whether, on the named occasion, the train was, when the plaintiff's intestate was first discovered on the track, running at a greater rate of speed than its usual speed or not. The question in this case, on the subsequent negligence counts, was, not what the locomotive was doing before or when the plaintiff's intestate was discovered on the track, but what those in charge of the train did after the discovery of the peril of the plaintiff's intestate.

2. The counts left in the complaint, which charged wantonness, were amply sufficient to meet the plaintiff's right of recovery, if, under his facts, the question of wantonness had been one for the jury. Under no theory of the case was the plaintiff entitled to recover for an act of initial negligence on the part of the defendant, its servants or agents. The trial court held that the plaintiff had a case for the jury on the question of subsequent negligence, and the counts in the complaint for subsequent negligence, upon which the case was tried, were amply sufficient for all of the exigencies of the plaintiff's case. The appellant can take nothing, therefore, from his first twelve assignments of error.—*Whaley v. Sloss-Sheffield Steel & Iron Co.*, 164 Ala. 216, 51 South. 419, 20 Ann. Cas. 822; 2 R. C. L. p. 244, § 203.

3. The trial court committed no error in refusing to permit the witness Helms to testify that in his judgment 50 per cent of the pedestrians who came into Dothan by a certain public road quit the road at the railroad crossing and walked into town along the roadbed of the defendant. This evidence was offered in the effort of the

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plaintiff to bring his case within the influence of the doctrine on the subject of wantonness, laid down in *Southern Ry. Co. v. Stewart*, 179 Ala. 304, 60 South. 927, and which was cited and quoted from in *Blackmon v. Central of Georgia Ry. Co.*, *supra*. On this subject it might have been competent for the witness to give his best recollection—if he knew enough of the situation to testify to it—as to the number of people who were daily accustomed to use the track of the roadbed, at the named point, for longitudinal travel; but the fact that 50 per cent of the pedestrians who used this particular public road were accustomed to quit the public road and go upon the track of the railroad does not indicate how many people used the track. It may be that only a few people were accustomed to use this public road for foot travel. The appellant is entitled to take nothing because of his thirteenth, fourteenth, and fifteenth assignments of error.

4. A witness, Ed Hobbs, a son of the deceased, was with his father at the time of his death. This witness testified on behalf of the defendant, and he gave—if he told the truth and was sober enough at the time his father was killed to remember what occurred—the circumstances which led up to and resulted in his father's death. He gave, in detail, the various circumstances which formed a part of the *res gestae* of the occurrence, and about the time he had finished his account of the matter the defendant's counsel asked him if he had detailed to the jury the circumstances of the transaction." The court, over the objection of the plaintiff, allowed the witness to answer, "Yes, sir." We take it that by this question the defendant simply sought to have the witness state to the jury that he had, in his testimony, told them all that he remembered about the matter, and we can see no reason why the witness was not competent to so testify. The answer of the witness was simply a state-

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ment that he had given to the jury all of his knowledge on the subject.

5. The jury returned a verdict for the defendant. It mattered not, therefore, to the plaintiff, in so far as this case is concerned, how old the deceased was at the time he was killed.

6. The record in this case shows that on the only issue in this case which was properly before the jury, viz., the subsequent negligence vel non of the servants of the defendant who had charge of the locomotive, the trial judge committed no error in any of the charges which he gave to the jury. This is admitted by counsel for appellant. In fact, the record shows that the case, on this particular issue, was fully and fairly submitted, in all of its phases, to the jury, and that it went to the jury, on this issue, in as favorable a way, under charges given by the court at the request both of the plaintiff and of the defendant, as the plaintiff could reasonably have asked or anticipated. This court is therefore not in a position to help the plaintiff on this issue which a jury, after considering the conflicting evidence, decided in favor of the defendant.

7. Judgments have been frequently reversed on account of improper remarks of counsel, pending a trial, which probably prejudiced the case of the appellant before the jury. Counsel, however, are permitted a wide range in argument, and in supervising their arguments much latitude has always been allowed trial judges. In this case a son of the plaintiff's intestate had testified to facts, which, if true, showed that the defendant was not liable for the death of his father. This son, it is true, was impeached, and there was evidence tending to show that when his father was killed he was so drunk as to probably not be able to give a correct account of the matter. His testimony was before the jury, however, and the jury

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may have believed it. Appellee's counsel had a right to argue to the jury that the testimony of the son was true. During his argument counsel for appellee made the following remark—the basis of the assignment of error now under consideration: "What is the administrator here for? What is he doing in this suit? What is he here for? I ask you this, gentlemen of the jury."

It was, of course, patent to every person that the plaintiff in this suit was endeavoring to get a moneyed judgment against the defendant, and it may be that the counsel for appellee, after reviewing the testimony and after referring to the testimony of the son of the deceased, made the above remarks. It may be that he intended, as stated by counsel for appellant, to "convey to the jury that the plaintiff, as administrator, was prosecuting this suit for the purpose of getting money out of the defendant." That, as already said, was the plain purpose of the suit, and we see no reason why counsel had not the right to make the statement even if, in making it, he intended to submit to the jury the argument that there was no evidence in the case sufficient to justify the administrator's right of recovery. When a fact is in evidence—when a truth is plain—we see no reason why counsel may not, in argument, refer to it.—2R. C. L. p. 242, § 20.

8. In the instant case there was evidence that the deceased and two companions—one of them his son—used the point at which the deceased was killed as a convenient place at which to get drunk, and that they were thus drunk when the deceased was killed. The argument and the evidence in this case, with reference to wantonness, are substantially the same as they were in *Blackmon's Case, supra*, and our conclusion is the same on that subject as it was in *Blackmon's Case, supra*. The man whose death was the subject of inquiry in *Blackmon's*

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Case, supra, and the man whose death is the subject of inquiry in the present case, were, when they were killed, trespassers upon the tracks of railroads, and they were not killed under circumstances indicating wantonness on the part of those who controlled the locomotive which killed them. In this case a jury, upon consideration of all the evidence, has determined that after the discovery of the intestate's peril the servants of the defendant committed no act of simple negligence which proximately caused the intestate's death. This being true, there could not, under the law, have been after the discovery by them of plaintiff's intestate's peril such an act of willful neglect on the part of the defendant's servants as amounted to wantonness. The judgment of the trial court is therefore affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

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Taxation.

(Decided July 2, 1914. Rehearing denied July 25, 1914.
66 South. 1.)

Taxation; Corporate Stock; Exemptions.—Since under subdivision 9, section 2082, Code 1907, the corporation has a lien upon the shares of stock for the taxes paid thereon, it was the obvious intention of the legislature that the tax should be levied upon the shareholder and not upon the corporation, and notwithstanding section 2082, a shareholder cannot claim exemptions which the corporation is entitled to assert.

CERTIORARI to Court of Appeals.

Application by the state of Alabama for certiorari or other remedial writ to review the decision rendered by

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the Court of Appeals in the case of *State of Alabama v. T. E. Lovejoy*, (Mem) 64 South. 1021, to collect on the suit of the state the sum of \$157.95 as taxes due by Lovejoy to the state and county upon 1,950 shares of the capital stock of the Alabama Fidelity & Casualty Company. Writ granted, and the decision of the Court of Appeals reversed, and the cause remanded.

R. C. BRICKELL, Attorney General, and T. H. SEAY, Assistant Attorney General, for the State. The court erred in allowing the exemptions.—*Tarrant v. Bessemer N. Bank*, 61 South. 47; *McGuire v. Bd. of Rev.*, 71 Ala. 413; 3 Wall. 581. These authorities are in conflict with the decision in the case of *Elmwood C. Co. v. Tarrant*, 170 Ala. 459.

JOHN R. TYSON, for appellee. The assessment was made against the stockholders and not against the company, and therefore, it did not comply with subd. 9, § 2082, Code 1907. The spirit, as well as the letter of section 2082 of the Code, give the exemption to the stockholders against taxation of shares held by them, which was clearly allowable to the corporation. The case of *Elmwood C. Co. v. Tarrant*, 170 Ala. 450, is clearly against the contention of appellant. The judgment, therefore, of the Court of Appeals should be sustained.—*State v. Lovejoy*, 64 South. 1021.

ANDERSON, C. J.—Section 2082 of the Code of 1907, subd. 9, provides for the assessment of every share of stock of any corporation therein embraced, and, while the assessment must be made by the officer of the corporation, and the tax is to be paid by the corporation, it was the manifest purpose of the Legislature to levy the tax on the shares of stock and against the holder

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thereof, as distinguished from the corporation itself. This section also provides that in arriving at an estimate as to the value of the respective shares so assessed there shall be deducted from the aggregate amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessor for taxation, owned by such corporation, and the residue of the value remaining after such deduction shall be the assessed value of the whole of such shares, and such residue, divided by the whole number of shares, shall constitute the value of each share for taxation, and the corporation shall pay for the shareholder the tax assessed against his shares, and the amount so paid for any shareholder shall be a lien on any interest which such shareholder may have in any property owned by the corporation. It is also provided that, if the aggregate value of the shares does not exceed the aggregate value of the real and personal property returned for taxation, then no tax shall be demanded or collected upon the shares.

The tax is therefore levied against the share, and, though paid by the corporation, must necessarily come out of the shareholder in the end, as the corporation is given a lien on the share for the tax paid thereon, and, unless the value of the share exceeds the assessed value of the property returned by the corporation, there can be no assessment or collection against the share. In other words, a liability is fixed against the shareholder and the method of enforcing same is provided.

It will be noticed that the foregoing deduction is the only one authorized by the statute, except as to fire insurance companies owning Alabama bonds. Therefore to authorize a deduction from the shares of the value of the property which may be exempt to the corporation,

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in addition to the value of the real and personal property assessed by it, would be an unwarranted interpolation of the statute, and which seems to have been the action of this court in the case of *Elmwood Cemetery Co. v. Tarrant*, 170 Ala. 549, 54 South. 186. We therefore hold that the only deduction authorized by the statute was the amount for which the property of the corporation was assessed for taxation, and not the value of such property as may have been exempt from taxation in favor of said corporation.

The distinction between an assessment against the shares of stock held in a corporation and an assessment against the corporation proper has been generally recognized and regarded by nearly all the courts of the land.—*Tarrant v. Bessemer National Bank*, 7 Ala. App. 285, 61 South. 47; *Maguire v. Board of Revenue*, 71 Ala. 401; *State v. Sellers & Orum Co.*, 151 Ala. 557, 44 South. 548; *Van Allen v. Assessors*, 3 Wall 581, 18 L. Ed. 229. It has also been generally held that this method of taxing the shares of stock without deducting the value of the property which may be exempt to the corporation is in no sense violative of federal or state Constitutions.—*Bradley v. People*, 4 Wall. 459, 18 L. Ed. 433; *Cleveland Trust Co. v. Lander*, 184 U. S. 113, 22 Sup. Ct. 394, 46 L. Ed. 456; *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895; *Bank of Commerce v. Tenn.*, 161 U. S. 134, 13 Sup. Ct. 456, 40 L. Ed. 645; *First National Bank v. Board of Equalization*, 92 Ark. 335, 122 S. W. 988; *Batterson v. Hartford*, 50 Conn. 558; *People v. Bradley*, 39 Ill. 130; *Wright v. Stilz*, 27 Ind. 338; *German-American Bank v. Burlington*, 118 Iowa, 84, 91 N. W. 829; *Home Ins. Co. v. Assessors*, 42 La. Ann. 726, 8 South. 481; *Tremont Bank v. Boston*, 1 Cush. (Mass.) 142; *St. Louis B. & Ass'n v. Lightner*, 47 Mo. 393; *Belo v. Commissioners*, 82 N. C.

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415, 33 Am. Rep. 688; *Fox v. Haight*, 31 N. J. Law, 399; *City of Utica v. Churchill*, 33 N. Y. 162; *Providence R. R. Co. v. Wright*, 2 R. I. 459; *Harrison v. Vines*, 46 Tex. 15; *Salt Lake Bank v. Golding*, 2 Utah, 1; *Jennings v. Commonwealth*, 98 Va. 80, 34 S. E. 981.

Section 2083 of the Code of 1907 has no bearing upon the present question, as it makes no attempt to extend exemptions, but merely preserves the ones already given, and, if this was an assessment against one entitled to an exemption, it should be allowed, but, as we have previously demonstrated, this is an assessment against the shareholder, and not against the corporation, and said section 2083 does not attempt to extend the exemption.

In the case at bar the state's counsel concedes that the sum invested by this appellee in stock of other corporations organized in this state and which had been assessed to the corporation was properly deducted, but contend that the sum on deposit and the amount invested in Alabama bonds, while exempt to the corporation from taxation, was improperly deducted in arriving at the assessable value of the shares of stock. We think this contention is sound, and that a deduction of the same was unwarranted by the statute.

The opinion in the case of *Elmwood Cemetery Co. v. Tarrant*, 170 Ala. 549, 54 South. 186, in interpolating into the present statute "exempt," as well as assessed, property, is unsound, and it is expressly overruled. The reason for said interpolation seems to be based upon the case of *State v. Stonewall Insurance Co.*, 89 Ala. 335, 7 South. 753, wherein the assessment was on the capital stock of the corporation and against the corporation, and not upon the shares of stock therein and against the shareholder. In other words, the present statute seems to have been framed so as to avoid the in-

[Ex Parte Doak.]

fluence of the opinion in the case of *Stonewall Insurance Co. v. State, supra*.

The Court of Appeals, in affirming the trial court, based its conclusion upon the binding influence of the *Elmwood Case, supra*, and, as that case must be expressly overruled, the judgment of the Court of Appeals is reversed, and the cause is remanded to said court for further consideration of the cause.

Reversed and remanded. All the Justices concur.

Ex Parte Doak.

Mandamus.

(Decided June 18, 1914. Rehearing denied July 2, 1914.
66 South. 64.)

1. *Judgment; Opening Default; Motion; Taking Under Advisement.*—Under practice acts 1888-9, p. 797, where a motion to open a default judgment was made and heard within thirty days after the entry of the judgment, an entry of an order by the court taking the motion under advisement continued the motion without a formal order of continuance, and authorized the court to determine the motion after the thirty days had expired; there being no reason why the common law order of *curia advisari vult* may not be employed in the case of motions as well as in respect of causes, since the setting aside of the judgment by default must be done by a formal judgment.

2. *Same; Affidavits on the Merits.*—Where the application was by a city to open a default judgment, an affidavit by the attorney of record for the city that he had caused a full investigation of plaintiff's claim to be made, and that from such examination he was of the opinion that the city had a meritorious defense, and was not liable to plaintiff, was a substantial compliance with the requirements of Acts 1888-9, p. 797, governing proceedings in the circuit court of Jefferson county.

3. *Same.*—Circuit Court Rule 11, as to proceedings in the Circuit Court of Jefferson County is superseded by the provisions of Acts 1888-9, p. 797, so far as specifying what the affidavit on an application to reopen a default judgment in such court, shall contain.

4. *Same; Discretion of Court.*—It is within the sound discretion of the circuit court to set aside a default judgment, when satisfied that an injustice has been done, or that it has been inadvertently or improvidently entered, and its decision thereon is not revisable on appeal unless abuse is shown.

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5. *Same; Hearing and Determination.*—On an application to open a default judgment, it is the duty of the court to consider all the circumstances so that the discretionary powers reposed in it may be wisely exercised, and although it deems it unnecessary to enter upon an inquiry involving the impeachment of the return of the sheriff, it was proper for the court to consider whether in fact there had been service upon the commissioner of the defendant city, as the return recited, so that such discretion might be soundly exercised.

6. *Dismissal and Non-Suit; Discontinuance; How Affected.*—A discontinuance can only be predicated on some positive act of the actor in the proceeding, or in consequence of the failure or omission of the actor to perform some precedent duty enjoined by law.

ORIGINAL petition by John Doak for a writ of mandamus. Writ denied.

The affidavit filed with the motion of the city of Birmingham to set aside the judgment by default is as follows:

Personally appear before me, clerk of the circuit court in and for said state and county, M. M. Ullman, who being duly sworn deposes and says that he is the attorney of record for the city of Birmingham, in the above-entitled cause. Affiant further says that he has caused a full investigation to be made of the claim of John Doak against the city of Birmingham, and, from the examination of said case made by affiant, affiant is of the opinion that the city of Birmingham has a meritorious defense and is in no manner liable to plaintiff in the above-entitled cause.

Also, the affidavit of R. E. Howard, deputy sheriff, who affirms that the summons and complaint in this case and in others was handed him to be served, and that he went to the city hall and left the papers, the summons and complaint, with Mr. H. S. Ryall, but at that time affiant did not see Culpepper Exum, and did not serve such paper on Culpepper Exum, and did not leave a copy of said summons and complaint with said Culpepper Exum, but that he wrote the return as upon Culpepper Exum as it now appears because of the fact that

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it was usual and customary to leave papers of this kind with Mr. Ryall, and make the return as though personally served. Also, affidavit of Culpepper Exum, stating in effect that he had never seen or heard of the summons of complaint in this case, and that he had informed the city attorney that no such summons and complaint had been served on him. Also, affidavit of Horace C. Wilkinson stating in effect that Ullman had requested him to permit the judgment to be set aside by consent, that he had declined, and that Ullman stated that the only excuse he had was that he had dictated demurrers to his stenographer, but had left town the next day, supposing that she had filed them, but she had not; and the reply affidavit of Ullman.

SMITH & WILKINSON, for appellant. The circuit court was without power to act on the motion, as the court lost all control over the judgment after the thirty days from the date of its rendition had expired.—Acts 1888-9, p. 797; *Agee v. Clark*, 60 South. 460; *So. Ry. v. Griffith*, 58 South. 425; *Ex parte H. A. & B. R. R. Co.*, 105 Ala. 221; *Gunnels v. State Bank*, 18 Ala. 676. It takes a continuance to keep such an order alive, and this continuance must affirmatively appear of record. A taking under advisement is not tantamount to a continuance.—4 P. & P. 824; 125 Mass. 205; *Johnson v. State*, 102 Ala. 1. No sufficient excuse is shown for setting aside the judgment.—*Albert Haas Co. v. Gibson*, 54 South. 994; *Traub v. Fabian*, 160 Ala. 210; *McLeod's Case*, 108 Ala. 81; *Ex parte Payne*, 130 Ala. 189. Mandamus was the proper remedy.—*Ex parte Waters*, 61 South. 904; *Ex parte Woodruff*, 123 Ala. 99.

ROMAINE BOYD and M. M. ULLMAN, for appellee. There must be a request and a definite and unqualified

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refusal before the writ will issue.—*Ex parte S-C. Gro. Co.*, 120 Ala. 434; *Minchener v. Carroll*, 135 Ala. 409. A submission of a motion and the taking of it under advisement within the thirty days amounts to a continuance for the term.—Black on Judgments, § 180; 2 Hal. 125; 3 Hal. 60; 9 B. & C. 172; Common Law Doctrine Curia Advisari Vult. A discontinuance is in effect and substance an abandonment by the moving party of his pending cause.—*Ex parte Humes*, 130 Ala. 201; 72 Fed. 128; 29 Pa. St. 203. The court is invested with a large discretion as to setting aside default judgment, and its discretion cannot be controlled by mandamus.—*Ex parte McKissack*, 107 Ala. 493; *Ex parte Dillard*, 68 Ala. 594; *Ex parte Merritt*, 38 South. 183. This discretion is not revisable unless abused.—*Talladega Co. v. McDonald*, 97 Ala. 508; *Colley v. Spivey*, 127 Ala. 109.

MCCLELLAN, J.—Application for writ of mandamus to require the vacation of an order or judgment, entered in the circuit court of Jefferson county in the cause of John Doak (petitioner) against the city of Birmingham et al., setting aside a previously entered judgment by default, with writ of inquiry executed against the city of Birmingham.

Doak's action was instituted March 4, 1913; and the summons to the city of Birmingham was returned executed March 8, 1913, by service on Culpepper Exum, commissioner of the municipality. On April 28, 1913, judgment by default was entered against the city on plaintiff's motion. On May 7, 1913, the city, through its counsel, filed its motion to have the judgment by default set aside. On May 10, 1913, the motion was heard and arguments were made by counsel for the respective parties, and on that day it was "ordered, decreed, and adjudged by the court that said motion be, and the same

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is hereby taken under advisement by the court, upon briefs to be submitted by the respective parties on or before May 15, 1913." On June 6, 1913, the court granted the motion to set aside the judgment by default, and thereupon pronounced a formal judgment setting aside the judgment by default, imposing terms upon the city not important to be stated at this time.

The Practice Act governing proceedings in the circuit court of Jefferson county, approved February 28, 1889 (Acts 1888-89, p. 797 et seq.), contains these presently pertinent provisions: "And in all cases, whether commenced by summons and complaint, attachment, or otherwise, any defendant failing for more than thirty days after service has been perfected upon him to appear and demur or plead, shall be held to be in default, and, at any time thereafter, judgment by default, on motion of the plaintiff, may be rendered against him; provided, however, that the court may, for good cause shown, allow such judgment so obtained by default to be set aside, and demurrer or pleas to be filed, on such terms as the court may think just; but no application to set aside such judgment, unless it be for some reversible error committed in the rendition thereof, shall be entertained by the court, unless accompanied by an affidavit made by the defendant or his agent or attorney to the effect that, in the belief of the affiant, the defendant has a lawful defense to such suit. * * * That final judgments rendered in said court shall, after expiration of thirty days from their rendition, be taken and deemed as completely beyond the control of the court, as if the term of said court at which said judgments are rendered had ended at the end of said thirty days; provided, however, that nothing herein contained shall prevent parties from applying for new trials or rehearings, * * * when so made, or shall prevent parties from

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applying to said court for rehearings under the statute authorizing applications for rehearings in the circuit court, or shall prevent the court from retrying any cause under section 2871 of the Code of Alabama, or shall prevent the court from the exercise of any power or jurisdiction conferred upon the circuit court touching final judgments."

It thus appears that in the matter under review the motion to set aside the judgment by default was made within 30 days after its entry, was taken under advisement by the court within 30 days after the entry of the judgment by default, without at any time the entry of any formal order of continuance, and was favorably ruled upon during term time after the expiration of thirty days from the entry of the judgment by default.

It is insisted for petitioner, as upon the quoted provisions of the Practice Act, that the failure to act upon the motion before the expiration of 30 days from April 28, 1913—the date of the judgment by default—or to order a continuance of the motion before the expiration of that 30-day period, effected to deprive the court of any power to consider the motion. It is established with us that the expiration of the 30-day period stipulated in the Practice Act without action by the court on a motion for new trial or to set aside a judgment by default, or without an effective continuance of such a motion, the power of the court becomes extinct.—*Ex parte Payne*, 130 Ala. 189, 192, 29 South. 622; *Hundley v. Younge*, 69 Ala. 89. Such motions are not, like causes, continued by operation of law because not disposed of.—*Hundley v. Younge*, *supra*; *Payne's Case*, *supra*. So, the real question in this connection is whether the taking under advisement of the motion to set aside the judgment by default within the 30-day period operated a continuance thereof to such time as the court

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might lawfully act upon it; whether that action by the court preserved the court's power (subsequently to the expiration of the 30-day period) to determine the issue presented by the motion.

The order of the circuit court in taking the motion under advisement, after argument—a process that passed the matter into the breast of the court—was an observance of the common-law practice described in the phrase *curia advisari vult* (the court wishes to consider the matter.). The effect of the formal entry of that order was to continue the motion until the court might, during a lawful sitting, attain a conclusion and pronounce judgment thereupon.—Bouvier's Law Dict. pp. 485, 486; Black on Judg. § 180; Black's Law Dict. p. 310; *Clark v. Read*, 5 N. J. Law, 486; *Semple v. Trustees, etc.*, 8 N. J. Law, 60. Where the order is made taking the matter under advisement, it is the duty of the court to give the parties notice of the time, at the place of sitting of the court, the court will deliver its judgment.—*Clark v. Read, supra*; *Semple v. Trustees, etc., supra*. If there is undue delay by the court in delivering its judgment, a party has his remedy to compel action by the court.—*Clark v. Read, supra*.

It is urged for petitioner that the common-law practice of taking under advisement could be observed in respect of causes only—not for the purpose of deliberation upon motions—after judgment, to have judgment set aside, or a new trial granted. No good reason appears, nor has any been stated, why a different practice should be allowable in one instance and not in the other. The object of the practice is to permit the court to deliberate; to afford time and opportunity for the court to advise its judgment. A seasonably presented motion for a new trial, or to set aside a judgment by default, invokes judicial action of high character and of seri-

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ous importance. The purpose is to insure just judgments, between litigants; and the effect is, if the motion is granted, to avoid the previous judicial action and to restore the cause to the state of not having been anteriorly adjudged. And so it has been ruled, in this jurisdiction, that the action of the court in setting aside a judgment must be by formal judgment—an act of equal dignity with that it effects to avoid.—*Sou. Ry. Co. v. Nelson*, 148 Ala. 88, 41 South. 1006; *Turner v. Spragins*, 172 Ala. 98, 100, 55 South. 118.

Usually, a continuance of a cause or proceeding is, in legal contemplation, an adjournment or postponement thereof, to a time certain.—*Commonwealth v. Maloney*, 145 Mass. 205, 208, 13 N. E. 482.

An order of continuance of a cause or proceeding presupposes a status opposed to that prevailing when it has been submitted to the court for judgment. Such an order (continuance) negatives the notion that a complete hearing has been had and the matter committed to the court for its judgment. If the ordinary order of continuance is entered in a cause or proceeding, there is a necessary implication that the matter is still in fieri in respect to a hearing thereon.

The order *curia advisari vult* manifests the fact that the hearing is complete and the postponement is for allowing deliberation by the court—not with the view to further or other hearing in the premises. If, in order to avert the extinction of the juridical power over the proceeding because of the expiration of the term or of the limitation fixed for a period to have that effect, it were required that formal order of continuance should be entered, an anomalous situation would be created, or else the rational common-law practice under consideration would be forbidden observance. The common-law practice indicated is too conservative of the best re-

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sults in judicial administration to justify its abrogation without cogent reason therefor. None such appears or is shown.

The effect of the order of the court taking the motion under advisement being to preserve the power of the court to consider of and pronounce its judgment after the expiration of the 30-day period stipulated in the Practice Act quoted, it is clear that no discontinuance of the proceeding resulted; for it is established with us that a discontinuance can only be predicated of some positive act of the actor in the proceeding, or in consequence of the actor's failure or omission to perform some precedent duty enjoined upon the actor by law.—*Ex parte Holton*, 69 Ala. 164, 188; *Ex parte Humes*, 130 Ala. 201, 30 South. 732.

It is insisted for the petitioner that the affidavit made by counsel for the city in support of its motion to set aside the judgment by default was insufficient for the purpose under the terms of the first-quoted provision of the Practice Act. It has been ruled that the failure to file with the motion an affidavit, "by the defendant, his agent or attorney, to the effect that, in the belief of affiant, the defendant has a lawful defense to such suit," operated to defeat the right of the court to consider a motion to set aside the judgment by default.—*Ex parte Payne*, 130 Ala. 189, 29 South. 622.

The substantial parts of the affidavit filed with the motion of the city to set aside the judgment by default will be set out in the report of the appeal. While it does not contain the exact phraseology employed in the quoted excerpt from section 1 of the Practice Act, it is a substantial compliance with the provisions of that act. The affidavit substitutes "opinion" for "belief" and "meritorious defense" for "lawful defense," and concludes with the statement that the city was not liable;

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all after the affirmation that a full investigation has been made by counsel for the city. Rule 11 of circuit court practice (Civil Code, pp. 1519, 1520) is not governing in this relation, in the circuit court of Jefferson county. Its application therein is superseded by the Practice Act as quoted ante.

"The power of a court of record over its judgments during the term at which they are rendered is very large, if not unlimited. It rests within the sound discretion of the court to set them aside, when satisfied that injustice has been done, or that they have been inadvertently or improvidently entered. * * * The judgments of courts are in the breast of the judge until the final adjournment of the term, and may be set aside or modified during the term."—*Talladega Merc. Co. v. McDonald*, 97 Ala. 508, 511, 12 South. 34, 35; *Sparks v. Reeves*, 165 Ala. 358, 51 South. 575.

In the last-cited opinion, treating the discretionary power under consideration, this court said: "Both of these matters are within the discretion of the trial court, and, unless abused, are not revisable on appeal."

And in the later pertinent deliverance made here, in response to *Parker's* petition for mandamus (172 Ala. 136, 138, 54 South. 572), a like pronouncement was made. To the same effect is *Allen v. Lathrop*, 90 Ala. 490, 8 South. 129.

It cannot be affirmed that the circuit court abused the sound discretion with which it was invested in the premises. It was the duty of the court to consider all the circumstances with the view to advising its judgment so that the discretionary power reposed in it might be wisely exercised. It was not, and so the court seems to have concluded, necessary to enter upon an inquiry involving the impeachment of the sheriff's return; though it was proper that the court consider whether

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there had in fact been service upon the commissioner of the city as that return recited, to the end that its discretion, seasonably invoked, might be soundly exercised.

The decision, in respect of a new trial, in *McLeod's Case*, 108 Ala. 81, 19 South. 326, has been consulted. It is not opposed to the conclusion we have stated. There the whole contention was that counsel's absence from the trial was unavoidable. This court found that the undisputed evidence refuted this assertion, and thereupon affirmed that the question was one of law and not of discretion in the trial court. Here the judgment was by default; and the circumstances shown to the court might quite reasonably have invited its conclusion that "good cause" justified the restoration of the cause to a trial-status.

The writ of mandamus prayed is denied.

Writ denied.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ.,
concur.

Purifoy, Treasurer, v. Teasley, Judge.

Mandamus.

(Decided June 30, 1914. 66 South. 6.)

Pensions; Pensioners.—The widow of a pensioner who was drawing a pension under Acts 1911, p. 690, is a pensioner within section 27 thereof, authorizing the probate judge to collect the pension upon a compliance with the provisions of the said Act.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Application by Charles B. Teasley as probate judge,
for a writ of mandamus directed to John Puri-

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foy as State Treasurer, requiring him to pay a certain pension warrant. From a judgment for petitioner respondent appeals. Affirmed.

R. C. BRICKELL, Attorney General, for appellant. The words, "should a pensioner die," as used in § 27, Acts 1911, p. 690, are limited by the provisions of said act which immediately follow, and this limitation shows that it could not have been the legislative purpose to authorize a probate judge to collect a warrant made payable to a widow after the death of such widow, as a widow cannot leave a widow surviving.

CHARLE B. TEASLEY, pro se. No brief reached the Reporter.

MAYFIELD, J.—The only question presented by this appeal is whether or not a widow who is drawing a pension under the act of April 24, 1911 (Gen. Acts 1911, p. 690), is a "pensioner" within the meaning of that word as used in section 27 of that act. Section 27 of that act provides as follows:

"Should a pensioner die, leaving a widow, who would be entitled to a pension under the provisions of this article, or leaving minor children, the judge of probate shall deliver the warrant to the widow or minor children, or child of such pensioner, and should there be no widow or minor child of such deceased pensioner, the judge of probate shall indorse and collect the warrant and attach it to his certificate, showing the facts upon which he is authorized to so indorse and collect the warrant, and the proceeds thereof he shall apply first, to the payment of the burial expenses; second to the expenses of the last illness of such pensioner."

Mrs. S. A. Williams was drawing a pension under the provisions of this act, and \$16 was due her when

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she died, February 26, 1914, for which, the auditor's warrant had not been delivered to her by the probate judge. The warrant was indorsed by appellee as probate judge, and presented to the appellant as State Treasurer for payment, and payment was declined upon the ground that Mrs. Williams was not a "pensioner," within the meaning of section 27 of the Act of 1911, pp. 697, 698. Appellee applied to the city court for a writ of mandamus commanding the treasurer to pay such warrant, and a peremptory writ was awarded as prayed; from such order and judgment this appeal is prosecuted.

We think it certain that Mrs. Williams was a "pensioner" within the meaning of the section of the statute in question, and that the treasurer should have paid the warrant when presented. "Pensioner," as there used, includes a widow, as well as a man. The fact that Mrs. Williams, being a woman, could not have left a *widow* at her death does not show or argue that she could not be a "pensioner." She could have left a "minor child" or "children," or had "burial expenses," or "expenses of last illness," which facts will authorize the probate judge to collect the warrant, when indorsed and with certificate attached showing the facts which authorize him to so collect, which was done in this case.

The trial court ruled correctly, and the order and judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ.,
concur.

[DeKalb County v. Price.]

DeKalb County v. Price.

Contest of Stock Law Election.

(Decided June 30, 1914. 66 South. 12.)

1. *Animals; Stock Law Election; Mutilated Ballot.*—Where seventy-eight ballots were cast at a stock law election, thirty-nine for and thirty-eight against, and the remaining ballot was so mutilated that the intention of the voter could not be ascertained, the result should have been declared in favor of stock law, in the absence of other irregularity.

2. *Same; Contest; Review.*—The qualifications of voters whose votes were eliminated by the probate court in a stock law election contest, cannot be reviewed on appeal where the evidence introduced relative thereto is not preserved in the bill of exceptions.

3. *Same.*—The action of the probate court in a stock law election contest, in eliminating a ballot because it failed to disclose whether it was for or against stock law, can not be reviewed, where neither the ballot nor any description of the ballot is before the appellate court.

4. *Same.*—Where, in a stock law election contest, the record contained a recital of the evidence as to the residence of certain persons whose votes were contested, the presumption was that it contained all the evidence thereon; and hence, the finding of the probate court on those matters was reviewable.

APPEAL from DeKalb Probate Court.

Heard before Hon. JAMES A. CROLEY.

Contest of a stock law election by M. M. Price against DeKalb county. From a judgment for contestant, contestee appeals. Reversed and rendered.

I. M. PRESSLEY and J. M. QUINONES, for appellant. Counsel discuss the qualifications of certain voters mentioned in the transcript, with citations of authority to show that they were not qualified voters, but in view of the opinion it is not deemed necessary to set them out in detail.

ISELL & SCOTT, for appellee. No brief reached the Reporter.

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SAYRE, J.—This appeal has been taken from the judgment of the probate court of DeKalb county in the matter of a contest of a stock law election held for precinct No. 10 on the 7th of February of this year. We learn from the petition filed for contest that the managers of the election declared the result against stock law. From the same source we learn that the result should have been declared for stock law. It appears that at said election 39 ballots were cast for stock law, 38 against. The intention of the voter casting the remaining ballot could not be ascertained, and so the managers counted that ballot against stock law, with result that the affirmative of the issue failed to receive a majority. On the facts stated, and the assumption that the managers of election were right in receiving the other votes cast, the result should have been declared by them in favor of stock law. In the probate court a number of ballots cast on either side were contested on the ground that the voters were not qualified electors, and, after evidence heard, the court was of opinion that "Stock Law, Yes," had received 32 votes, "Stock Law, No," 31, and so contest was sustained and judgment rendered declaring the result in favor of stock law.

We have been unable to find in the record any safe ground upon which to proceed to a review of the qualifications of a majority of the 23 voters whose right to vote is asserted or denied, as the exigency of its case required, in the assignments of error and in brief for appellant. To illustrate the condition of the record for the most part, we may refer to the case of J. B. Blevins, who voted against stock law, but whose vote was eliminated by the probate court, erroneously as appellant contends. The recital of the bill of exceptions is that: "The contestant introduced the record, tally sheet, and ballot number 39, to show that J. B. Blevins voted for

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'Stock Law, No,' and that said J. B. Blevins failed to pay his poll tax for the year 1906."

Contestee's presentation of the case as to Blevins is thus shown in the bill: "J. B. Blevins was registered and paid poll tax in 1906 to 1913." Perhaps this last-quoted statement from the bill of exceptions may be taken as a statement of the exceptor's judgment of the effect of the evidence offered by him. It is not a statement of the evidence itself, or any witness or witnesses, in a form fit for review in this court where, in cases of this character, both the law and the facts must be determined on appeal. This is all we know of Blevins and his qualifications as an elector. The bill concludes with the statement that, "This was all the testimony in the case." As matter of fact no records, tally sheets, or ballots are copied into the record. In this condition of the record, we cannot say there was error in the lower court's finding that Blevins was not a legal voter. So of others whose votes were eliminated under similar circumstances.

To illustrate the condition of the record with reference to a number of the votes contested by the contestee, but counted by the probate court nevertheless for stock law, we may state the showing made in the case of W. Z. Jones. The recital of the bill of exceptions is that: "The contestee also introduced the records, tally sheets, and ballots, to show that the following electors, who voted for 'Stock Law, Yes,' were not qualified to vote in said election: W. Z. Jones, was not registered."

This is all we know about Jones. The "records," etc., are not there. The court below counted Jones' vote. It must have been found on evidence not before us that Jones was registered, and we cannot say the court was wrong. So of a number of others.

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The ballot cast by T. L. O'Neal was eliminated on the ground that the court could not say on inspection whether he had voted for or against stock law. We have not the ballot nor any description of it before us and will not say the court was in error.

The record contains a recital of the testimony of witnesses as to the residence of L. M. Price, L. C. Price, and L. H. Storey, whose votes were contested by contestee (appellant), and whose votes were counted for stock law. As to the issues so made there could have been no "record" evidence. We conclude, hence, that we have before us all the testimony touching the residence of these voters, and are in position to review the findings of the trial court as to them. We find that these voters were nonresidents of DeKalb county at the time of the election, and that their votes should have been rejected, though in the probate court it was held otherwise, and this finding, along with the presumption that the court ruled correctly in all those instances we have been unable to review for reasons stated above, leads to the conclusion that the lower court's ruling as to the general result was erroneous and should be reversed.

Accordingly, the judgment in favor of stock law will be reversed, and a judgment here rendered declaring the result against stock law in precinct ten of DeKalb county.

Reversed and rendered.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

[Brown, Treasurer, v. Gay-Padgett Hdw. Co.]

Brown, Treasurer, v. Gay-Padgett Hdw. Co.

Summary Judgment.

(Decided July 25, 1914. 66 South. 161.)

1. *Counties; Debts; Classification.*—The legitimate debts of counties may be divided into two classes; those which are prescribed by law and purely involuntary as to the county, which are preferred claims against the general treasury, and which section 153, Code 1907, requires the treasurer to set aside sufficient funds to pay, and those which are authorized by law merely, and are assumed by the county with some measure of discretion at least as to time and amount, which the county cannot incur when it has reached its constitutional debt limit.

2. *Same; Current Obligations; Anticipated Revenue.*—Although a county has reached its constitutional debt limit, it is bound to pay its ordinary current obligations for governmental purposes, and for this purpose may anticipate revenues actually assessed and payable for the year in which the obligations were incurred.

3. *Same; Voluntary Obligation; Constitutional Debt Limit.*—Where a county has reached its constitutional debt limit, all further voluntary obligations assumed or incurred after the expenditure of the full amount of revenues on hand, or in legal expectancy, are debts within the constitutional prohibition and not enforceable.

4. *Same; Borrowing Money.*—Where a county has reached its constitutional debt limit, it cannot borrow money, even to provide funds for current and necessary municipal expenses.

APPEAL from Jackson Circuit Court.

Heard before Hon. W. W. HARALSON.

Motion by the Gay-Padgett Hardware Company for summary judgment against Dallas Brown, as county treasurer, for refusing to pay certain claims which had been allowed by the commissioners' court of Jackson county, and for which warrants had been drawn against the general or special funds of the county. From a judgment granting the motion, the treasurer appealed. Affirmed.

See, also, 186 Ala. 561, 65 South. 333.

Motion was filed under section 5938, Code of 1907. The claims were as follows: \$36 for tools and road ma-

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terial; \$19 for work on the county bridge; \$25 for a fee due the sheriff under sections 7383 to 7385, Code of 1907; \$38 due for a filing case purchased for the use of the probate office; and \$89 due the keeper of the poor-house for a quarter's salary under a contract. The record shows that there were unappropriated funds in the treasury at the time of demand and at the date of the trial sufficient for the payment of these various items.

JOHN F. PROCTOR, for appellant. Under the following decisions it must be held that the claim here presented and sued on was not enforceable for the reason that the county had reached its constitutional debt limit.—§ 224, Const. 1901; *Gunter v. Hackworth*, 62 South. 103; *Commissioners v. Moore*, 53 Ala. 125; *Speed v. Cocke*, 57 Ala. 201.

BOULDIN & WIMBERLY, for appellee. There are two questions involved, first, whether Jackson county has reached its debt limit under the Constitution; and if so, are these demand debts within the meaning of the Constitutional limitation. This subject was somewhat considered in *Gunter v. Hackworth*, 63 South. 101. In this connection it is well to keep in view the provisions of Acts 1898-9, p. 43, which were in force at the time that section 224, Constitution 1901, became operative. Constitutions are made for practical purposes and should be reasonably construed.—*State, ex rel. v. Thompson*, 142 Ala. 98; *State v. McCarty*, 59 South. 546. A county must necessarily incur debts.—*Simpson v. Lauderdale County*, 6 Ala. 64. A county which has reached the debt limit may incur by contract or by operation of law any liability it could otherwise incur provided it has funds in the treasury to meet them as they accrue, or a sufficient sum to discharge such liabilities

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is being raised by taxation during the current year. Such seems to be the generally accepted doctrine in other states; and surely is sound in principle.—McQuillon on Municipal Corporations, 2219 & notes; *City Council of Dawson v. Waterworks Co.*, 106 Ga. 713; *Butts v. Jackson Banking Co.*, 129 Ga. 801; *Tate v. City of Elberton*, 136 Ga. 301; *Addyston Pipe Works v. Curry*, 197 Pa. St. 41 (48); *South Bend v. Reynolds*, 155 Ind. 70; *Cedar Rapids v. Bechtel*, 110 Ia. 196; *Smith v. Dedhan*, 144 Mass. 177; *Gubner v. McClellan*, 115 N. Y. 755; *Darling v. Taylor*, 7 N. D. 538; *Hull v. Ames*, 26 Wash. 272; *Nate* 37 L. R. A. (U. S.) 1080, et seq. If a county without power to incur debt purchases personal property on credit, the title does not pass and the seller may reclaim it. This question arises and has bearing on the claim for the book-case furnished the judge of probate's office.—Dillon on Municipal Corporations, Sec. 209, p. 409; *Municipal Securities Co. v. Baker Co.*, 39 Ore. 396; *Chapman v. Douglass*, 107 U. S. 348; *Manchester S. R. Co. v. Concord R. Co.*, 66 N. H. 100. Where money, services, or property is furnished to, appropriated and used by a county for its lawful and necessary purposes, but by reason of its want of power to incur debt, no indebtedness is or can be then created, yet, when the county has the funds in hand it becomes liable for money had and received, or upon a quantum meruit for work and labor done, or for the value of property appropriated to its use.—*Butts County v. Jackson Banking Co.*, 129 Ga. 801; *City Council of Dawson v. Waterworks Co.*, 106 Ga. 713; *Salt Lake City v. Hollister*, 118 U. S. 256; *Parkersburg v. Brown*, 106 U. S. 487; *Thomas v. Railroad Co.*, 101 U. S. 71; *Louisiana v. Wood*, 102 U. S. 284; *Chapman v. Douglass Co.*, 107 U. S. 348; Dillon on Municipal Corporation, Sec. 126; *Allen v. LaFayette*, 89 Ala. 641; *Mayor*

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v. Hollingsworth, 170 Ala. 402-3-4; *Gen. Electric Co. v. Town of Ft. Deposit*, 174 Ala. 179.

SOMERVILLE, J.—In the case of *Gunter v. Hackworth*, 182 Ala. 205, 62 South. 101, we held that the indebtedness of Jackson county exceeds the limitation fixed by section 224 of the Constitution, and that the county could not incur any further indebtedness, even for the rebuilding of the county court house, which had been destroyed by fire. Speaking in general terms, it was there said, per SAYRE, J., that:

“The prohibition against indebtedness is generally construed to apply to indebtedness in all forms, however incurred, or for whatever purpose. Such has been the ruling of this court.—*Hagan v. Commissioners, etc.*, 160 Ala. 544, 49 South. 417, 37 L. R. A. (N. S.) 1027.”

In *Hagan's Case*, *supra*, it was said, per DENSON, J., that: “The obvious intent of section 224 is to restrain counties from obtaining money either upon the general credit of the county, or by pledge or transfer of its revenue or assets, thereby creating a debt and imposing additional burdens upon the citizens, which, whether directly or indirectly, involve increased taxation.”

The questions presented by this appeal require a more specific consideration of the terms “indebted” and “indebtedness” as used in section 224 of the Constitution.

It is clear that, if they are to be understood in their broadest signification, the effect of section 224 would be, not only to inhibit further indebtedness when the prescribed limit is reached, but also to practically forestall all municipal action; for certainly neither a county nor a city government could proceed for a single day in the exercise and discharge of its municipal powers and duties without incurring, for some period of time, debts, or liabilities. It becomes apparent at a glance that the

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makers of the Constitution could not, in reason and common sense, have intended any such result.

Such limitations as ours are common throughout the United States, and the questions here under consideration have been often before the courts. In an elaborate review of the authorities, the learned editor of the *Lawyers' Reports Annotated* thus states the consensus of judicial opinion:

"The clear and unmistakable purpose of the framers of the organic law, in inserting this provision, was effectually to protect persons residing in municipalities from the abuse of their credit, and the consequent oppression of burdensome, if not ruinous, taxation. The mischief to be prevented was the creation of an excessive debt for local improvements or public works, or the loaning of municipal credit, so payable that the burden should not fall upon those who contracted the obligations, or on their revenues, but on posterity." Note to *Hagan v. Commissioners' Court*, 37 L. R. A. (N. S.) 1061.

In short, the indebtedness intended is the obligation to pay more money than can be supplied by current funds, or by current revenues provided by lawful taxation for the fiscal year. And the requirement is that, whenever a county has reached the constitutional limitation, it must at once adopt the financial policy of *paying as it goes*.

The Supreme Court of Georgia has dealt very sensibly with the situation arising out of similar limitations in that state. Says the court, per EVANS, P. J.: "This differentiation between the debts which come within the operation of the constitutional provision and liabilities for legitimate current expenses to be paid out of the taxes, which can be properly levied during the year in which the liability was incurred is neither artificial

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nor arbitrary. This constitutional provision must be construed in the light of the history of the law on the subject in this state, and the long-established affairs of a county. From the earliest times it has been the declared policy of this state that each year shall be a fiscal unit, and that current expenses should be met by a levy of taxes of the same year that the expenses were incurred. * * * In the meantime it is necessary that the governing officers of the county should discharge the duties imposed by law * * * and [provide] for other necessary current expenses of running the affairs of the county. There was no authority of law for the county to borrow money with which to meet these expenses. The alternative, therefore, was presented that, as each year's expenses had to be paid out of the taxes of that year, the county must either incur a liability for these current expenses or there must be a complete cessation of public activities and governmental functions until the taxes were collected. There is no provision in the Constitution of 1877 designed to meet this contingency; and hence we may conclude that the inhibition against creating any new debt was never intended to prevent the county from contracting liabilities for current expenses in anticipation of its annual revenue, and which were to be paid from the revenue."—*Butts County v. Jackson Banking Co.*, 129 Ga. 801, 809, 60 S. E. 149, 152, 15 L. R. A. (N. S.) 567, 574, 121 Am. St. Rep. 244, 252.

To the same effect are the cases of *G. P. & R. Mfg. Co. v. Cleburne* (Tex. Civ. App.) 127 S. W. 1072; *Erie's Appeal*, 91 Pa. 398; *Reuting v. Titusville*, 175 Pa. 512, 34 Atl. 916; *Grant v. Davenport*, 36 Iowa, 396; *French v. Burlington*, 42 Iowa, 614; *People ex rel. Seeley v. May*, 9 Colo. 414, 15 Pac. 36; *State ex rel. Ash v. Parkinson*, 5 Nev. 415; *Valparaiso v. Gardner*, 97 Ind. 13,

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49 Am. Rep. 416; *Alpena v. Kelley*, 97 Mich. 550, 56 N. W. 941; *Re State Warrants*, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852; *State v. Medbery*, 7 Ohio St. 529. A very full collection and review of the cases on this subject will be found in the note to *Hagan v. Com'r's Court*, 37 L. R. A. (N. S.) 1058-1109. See, also, note to *Beard v. City of Hopkinsville* (Ky.) 44 Am. St. Rep. 229-243.

In *State v. Medbery*, 7 Ohio St. 529, the court says: "So long as this financial system is carried out in accordance with the requirements of the Constitution, unless there is a failure or defect of revenue, or the General Assembly have failed for some cause to provide revenue sufficient to meet the claims against the state, they do not and cannot accumulate into a debt. Under this system of prompt payment of expenses and claims as they accrue, there is, undoubtedly, after the accruing of the claim, and before its actual presentation and payment, a period of time intervening in which the claim exists unpaid; but to hold that for this reason a debt is created, would be the misapplication of the term 'debt,' and substituting for the fiscal period a point of time between the accruing of a claim and its payment, for the purpose of finding a debt; but, appropriations having been previously made and revenue provided for payment, as prescribed by the Constitution, such debts, if they may be so called, are, in fact, in respect of the fiscal year, provided for with a view to immediate adjustment and payment. Such financial transactions are not, therefore, to be deemed debts."

In *Re State Warrants*, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852, the court says: "Critically considered, it may constitute the incurring of an indebtedness; but it is not an indebtedness repugnant to the Constitution, because its payment is legally provided for by

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funds constructively in the treasury. If the drawing of a warrant upon the state treasury is the incurring of an indebtedness by the state, then the drawing of such a warrant would violate the Constitution, even if there was money in the state treasury to pay it, if the constitutional limit of indebtedness had been reached; for there must always be some time intervening between the drawing of the warrant and its payment, and during such time the indebtedness of the state would be increased beyond the constitutional limit. Such an interpretation of the constitutional limitation would obviously be too hypercritical to be practicable or reasonable. It being once established, as we think it is by the authorities already cited, that the revenues of the state assessed and in process of collection may be considered as constructively in the treasury, they may be appropriated and treated as though actually and physically there; and an appropriation of them by the Legislature does not constitute the incurring of an indebtedness within the meaning of section 2, art. 13."

Legitimate county debts or obligations are of two classes: (1) Those which are prescribed and imposed by law, and are purely involuntary as to the county; (2) those which are merely authorized by law, and are assumed by the county with some measure of discretion, at least as to time and amount.

Section 153 of the Code makes a number of specified county obligations preferred claims against the general treasury, and requires the treasurer to set aside sufficient funds for their payment. We think also that, by necessary implication, whenever the assessed revenues of an overburdened county are not sufficient for the payment of all current county obligations, those involuntary obligations which are fixed and imposed by law must be regarded as preferred claims of a second class,

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which are entitled to precedence over the general and voluntary obligations of the county.

As a result of the foregoing considerations, we hold that a county which is indebted up to the constitutional limit may nevertheless appropriate its anticipated revenues actually assessed for the payment of its ordinary current obligations incurred during and for the year for which such revenues are assessed and payable; that the obligations absolutely fixed by law are preferred claims; and that all voluntary obligations assumed or incurred after the exhaustion of the full amount of revenues on hand or in valid expectancy are debts which are repugnant to the Constitution, and are therefore invalid as to their payment.

We think it is clear, also, that such a county cannot *borrow money* even to provide funds for current and necessary municipal expenses. The record does not inform us as to the current fiscal condition of Jackson county, but, in the absence of evidence to the contrary, we will presume that the claims here involved, being authorized by law, and having been duly presented to and allowed by the commissioners' court, are valid claims within the rules prescribed above.

It results that the trial court properly rendered judgment for the plaintiff as to each of the claims.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ.,
concur.

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**State, ex rel. State Tax Commission v. Smith,
Auditor.**

Mandamus.

(Decided June 30, 1914. 66 South. 61.)

1. *States; Appropriation; Limitation of Amount; Items Included.*—Construing sections 2216, 2218 and 2222, and Acts 1911, p. 146, in the light of section 71, Constitution 1901, it is held that the salaries of the three members and of the secretary of the State Tax Commission are payable out of the state treasury in the same manner as are the salaries of other state officers, and that they are not payable out of the \$25,000.00 appropriation for said department.

2. *Same; Appropriation Bills; Construction.*—While appropriation bills should be construed without liberality towards those claiming their benefits, they should not be so strictly construed as to defeat the manifest objects of the bill.

(Sayre, Somerville and Gardner, JJ., dissenting.)

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Petition by the State Tax Commission of Alabama for mandamus directed to the State Auditor to require him to cease drawing his warrant in paying salaries of the members and secretary of the commission against the fund of \$25,000 appropriated by section 2222, Code 1907, but to draw and charge said salary account against the general fund not otherwise appropriated, and to direct the Auditor to draw his warrant against said above-named sum only for the payment of expenses other than the salaries of the commissioners and their secretary. From a decree sustaining demurrers to the petition, petitioners appeal. Reversed and remanded.

R. C. BRICKELL, Attorney General, FORNEY JOHNSTON and HENRY P. WHITE, for appellant. Sections 2216 and 2218, Code 1907, require the salary of the members of

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the board and the secretary thereof to be paid out of the state treasury as other salaries are paid, while section 2222, Code 1907, provides for the expenses incident to the administration of the affairs of the board, and has reference to salaries.—*State ex rel. Troy v. Smith*, in MSS.; *People v. Ball*, 4 Cal. 177; *State ex rel. Mobile v. Stone*, 69 Ala. 206; *State ex rel. Brickman v. Wilson*, 123 Ala. 259; *Sessions v. Boykin*, 78 Ala. 328; §. 71, Constitution 1901; *Riggs v. Brewer*, 64 Ala. 282; *Reynolds v. Taylor*, 43 Ala. 420; *Nichols v. Comptroller*, 4 S. & P. 154.

RUSHTON, WILLIAMS & CRENSHAW, for appellee. Section 2222, Code 1907, was not amended by the general appropriation bill of 1911, and said section provides the entire appropriation for the salaries and expenses of the department.—*Reynolds v. Taylor*, 43 Ala. 420; *Riggs v. Brewer*, 64 Ala. 282; *Nichols v. Comptroller*, 4 S. & P. 154; Acts 1911, p. 146. This section limited the entire appropriation for the commission, regardless of the wording of sections 2216 and 2218, Code 1907.—*State v. Bracken*, 154 Ala. 151; 60 L. R. A. 161; 88 Fed. 588; 83 N. E. 350; 87 N. E. 79; 12 Ga. 526; 77 Ill. 610.

DE GRAFFENRIED, J.—Article 10 of the Code of 1907 (sections 2210 to 2267 of said Code) creates the state tax commission, fixes the number of commissioners, the manner of their selection, their terms of office, their salaries, and the salary of their secretary. In this chapter the various duties and powers of the commission are enumerated, provision is made for the expenses of the commission, including the expenses of their secretary, and the wages paid stenographers, engineers, experts, and assistants. Sections 2219 and 2220 of the Code deal with these particular items of expense, and

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fix the limits beyond which such items of expense shall not go.

An examination of the article and cognate acts of the Legislature will disclose that the commissioners, as general supervisors of the matter of state taxation, are invested with large powers, and are charged with the performance of various and important duties which must necessarily entail upon the commission various expenses for which no express provision *ab ante* can be made. Section 2222 of the Code provides that: "The entire appropriation for the commission, together with every item of expense allowed therefor, shall not exceed in any one year the total sum of twenty-five thousand dollars, which sum, or as much thereof as may be necessary, is hereby appropriated annually."

1. The trial judge was of the opinion that the salaries of the three members of the commission and of the secretary of the commission are chargeable against said sum of \$25,000 provided for in above-quoted section 2222 of the Code. We do not think that, when section 2222 of the Code is read in connection with the other sections of the article of the Code to which it belongs, said section should be given such construction. We think that the Legislature, in said article and in the general appropriation bill which was adopted in 1911, has indicated that it intended the appropriation of \$25,000 to be treated as a fund placed by the state at the disposal of the commission for the purpose of enabling them to meet, as they may arise, the various important duties which they are by the law required to perform. The salaries of the members of the commission are fixed definitely by section 2216, and there is in said section an express provision that their salaries "shall be paid out of the state treasury in the *same manner as the salaries of other state officers are paid.*" The commissioners, therefore,

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under the plain language of the statute, are put, in so far as their salaries are concerned, upon the same footing as other officials of the state who are paid fixed salaries. Section 2218 provides that: "The commission may appoint a secretary at a salary of not more than eighteen hundred dollars per annum, which salary shall be paid in the same manner as salaries of other State officials are paid."

All other employees and all the other expenses of the commissioners of *all sorts* are required to be paid by voucher *approved by the Governor*. As to the salaries of the members of the commission and the secretary, there existed no necessity for the Legislature to make appropriation other than was made for them in the section fixing the amount of the salaries. As to the matter of the expenses of the commission there was a wise reason for declaring a limit beyond which such expenses should not go.

2. It seems to us that the Legislature, in so far as the question now in hand is concerned, has been its own interpreter. In section 1 of the act of 1911, known as the general appropriation bill, we find the following:

"Be it enacted by the Legislature of Alabama, that the following sums of money, or so much of each sum as may be necessary, be and the same are hereby appropriated for the purpose hereinafter specified, to be paid out of any money in the state treasury, not otherwise appropriated, for the fiscal years ending, respectively, on the 30th day of September, 1911, 1912, 1913 and 1914, to wit: * * * (51) For compensation of the chairman of the state tax commission, three thousand dollars for each year; (52) for compensaion of the two associate members of the state tax commission, twenty-four hundred dollars for each year; (53) for compensation

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of one secretary of the state tax commission, eighteen hundred dollars for each year."

Endlich on the Interpretation of Statutes says: "Where it is gathered from a later act that the Legislature attached a certain meaning to an earlier cognate one, this is to be taken as a legislative declaration of its meaning there."

While such legislative declaration is not conclusive as to the construction which should be given a statute, nevertheless, in providing in the manner above shown in the general appropriation bill of 1911 for the salaries of the members of the commission and the secretary, we think that the Legislature solved all doubt about the question we are considering and substantially declared that the salaries of the members of the commission and the secretary were not chargeable against the \$25,000 provided for in section 2222 of the Code. Section 71 of the Constitution reads as follows: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public schools. The salary of no officer or employee shall be increased in such bill, nor shall any appropriation be made therein for any officer or employee unless his employment and the amount of his salary have already been provided for by law. *All other appropriations* shall be made by separate bills, each embracing but one subject."

It may be that the provision for the salaries of the members of the commission and the secretary was unnecessary; but, as the Legislature saw proper to provide for the payment of their salaries just as it provided for the payment of the salaries of all other public officials in the general appropriation bill and which is entitled "An act to make appropriations for the ordinary ex-

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penses of the executive, legislative and judicial departments of the state, for the interest on the public debt and for public schools," we think that the Legislature, by the adoption of said general appropriation bill (General Acts 1911, pp. 146-152), indicated that, in the opinion of the Legislature, the salaries of the members of the commission and of the secretary were among the ordinary expenses for which special provision should be made in the customary general appropriation bills, and that it was not anticipated by the Legislature that such salaries were already provided for in the special appropriation of \$25,000 created by said section 2222 of the Code of 1907, and which section appears in the Code under the title of "Limits of Appropriation for Expenses," etc.—*State ex rel. Daniel W. Troy v. C. B. Smith, as Auditor*, 187 Ala. 411, 65 South. 942.

A critical examination of the above-quoted section 71 of the Constitution will disclose that the Legislature is prohibited, by the express command of the section, from embracing in a general appropriation bill *anything* but "appropriations for the *ordinary* expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public schools." Under this same constitutional provision there is an express command also that: "The salary of no officer or employee shall be increased in such bill, nor shall any appropriation be made therein * * * unless his employment and the amount of his salary have already been provided for by law."

In this same section there is also an express direction that: "All other appropriations shall be made by separate bills, each embracing but one subject.

It would seem, therefore, that when, in the general appropriation bill to which we have above referred, the Legislature made an appropriation for the salaries

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of the commission and its secretary, it thereby construed said section 2222 of the Code of 1907—which provides a special appropriation—as not providing a fund out of which said salaries could be paid, and that therefore it was appropriate that such salaries should be provided for in the general appropriation bill. If this be true, then it must follow that in the special appropriation provided in section 2222 of the Code the Legislature did not intend that such salaries should be included. Special appropriation bills are not necessary to provide for the salaries of the officers of the state, and the salaries of such officers are not usually so provided for. Special appropriation bills are necessary only when appropriations are made which cannot be provided for in the customary general appropriation bills.—*Woolf v. Taylor*, 98 Ala. 254, 13 South. 688.

We hardly think that it would be seriously argued, if the salaries of the commissioners had been decreased by the general appropriation bill of 1911, that such provision had not, in fact, operated upon such salaries in such a way as to affect their actual reduction during the four years in which this general appropriation bill was intended to operate.—*Riggs v. Brewer*, 64 Ala. 282.

It may be that the act of the Legislature, in providing for the salary of the secretary in the general appropriation bill, was, because the salary of such secretary is not fixed by the law, but by the commission itself, abortive. This circumstance indicates that, as the act creating the office of secretary and providing for the payment to him of a salary not to exceed a certain limit, *as other officials are paid*, the Legislature regarded—perhaps erroneously, because of the above constitutional provision—his salary as being a salary which comes within the purview of the customary appropriation bill, and that its payment should be provided for in such bill.

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The fact that the Legislature undertook in an abortive way to provide for the secretary along with the commissioners in the general appropriation bill adds strength to the proposition that the legislative understanding was that his salary had not been provided for in section 2222 of the Code, and that it was appropriate that legislative provision should be made therefor. At any rate the Legislature of 1911 did not see proper to make any appropriation for the commission, but it did make appropriations for the salaries of the commissioners and the secretary. The Legislature recognized, however, that section 2222 was still operative, and would continue to operate until repealed, and, as provision was specially made for the officers named in the general appropriation bill, it would seem that the Legislature of 1911 must have construed the named salaries as not being provided for in the special appropriation covered by said section 2222. If this is not true, then the Legislature did an absurd thing when it included the named salaries in the general appropriation bill of 1911.

We are, in passing upon the point involved, not concerned with the question as to whether the creation by the Legislature of the state tax commission was or was not a wise legislative act. The commission was created, and its various powers were conferred upon it, by the act under consideration and cognate acts for the purpose of placing in the hands of those who are called upon to execute our laws which concern the subject of taxation the authority to so equalize the burdens of taxation as to require each citizen of the state to pay into the state's treasury that toll which, from the character and amount of protection furnished to him by the state, the state has the lawful right to demand of him as a just equivalent for such protection. Salaries are paid to public officials not so much as an equivalent for ser-

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vices performed as for the purpose of enabling them, while in office and in the performance of public duties, to be relieved of the necessity of constant watchfulness for the necessities and comforts of life. Under the authority conferred upon the commission it may—and frequently must—meet exigencies and incur expenses for which the law cannot ab ante provide. The expense accounts of the commission, under the terms of the article to which we have above referred, are payable upon approval by the Governor, so long as any part of the \$25,000 remains unexpended. The law requiring duties of the commission the expenses of which are left to the sound judgment of the commission subject to the approval of the Governor is operative upon the commission so long as there is any part of the \$25,000 remaining in the treasury. It is clearly inferable from the article to which we have above referred that it is the legislative expectation that, when the occasion for the commission to act arises, the commission must act, provided there are funds in the treasury lawfully appropriated which it can use in meeting the situation which confronts it. If there are no funds subject to its control, then, of course, the commission becomes powerless to act. The Legislature recognized, when it created the commission, that discretion must, at times, even in the use of public funds, be lodged somewhere, and, subject to the approval of the Governor, who may, at pleasure, remove any or all of the commissioners, discretion has been allowed in the matter of its necessary expense account up to the limit of \$25,000. The salaries of the members of the commission and of the secretary are not paid *in advance*. They are paid *monthly*, just as the salaries of other state officials are paid, and if their salaries are chargeable against the said \$25,000, the commission, to meet some unforeseen exigency which its du-

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ties under the law require it to meet, might, with the approval of the Governor, expend so much of said \$25,000 by the middle of some one year as to leave the members of the commission and the secretary without salaries for the balance of the year. This was not the purpose of the Legislature. It was the legislative purpose when this commission was created to treat the salaries of the members of the commission and the secretary just as the salaries of the Governor, the secretary of state, and all other public officials are treated, viz., as a part of the ordinary expenses of the state, and when, in section 2222 of the Code, the Legislature, under the title "Limit of Appropriations for Expenses," etc., declared that "the entire appropriation for the commission, together with every item of expense therefor, shall not exceed in any one year the total sum of twenty-five thousand dollars, which sum, or so much thereof as may be necessary, is hereby appropriated annually," it was dealing, not with the ordinary *expenses of the state*, but with that amount which the commission itself was authorized annually to expend, and which fund, in the opinion of the Legislature—as the amount is limited—is sufficient to meet all reasonable and necessary demands which may be made upon it. The state pays out of the treasury both items of expense, but one item is an item belonging to the ordinary expense of the state, and the other item is an item which belongs to the expenses of a separate department of the state government. Were we to hold otherwise, we would ingraft upon this commission a remarkable exception which the language of all the Code provisions relating to the subject and the above-quoted language taken from the general appropriation bill of 1911 cannot justify.

3. It is, of course, the rule shown by provisions in the Constitution itself that appropriation bills shall be

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construed without liberality towards those who claim their benefits, but it is also the rule that they shall not be so strictly construed as to defeat their manifest objects. The present situation disclosed by the petition in this case indicates that the construction which was placed by the court below upon the bill tends seriously to cripple the effectiveness of the commission. The just apportionment of taxes in a growing state is a subject which challenges the talent of the most wise, and the commission, which has been raised by the law for the purpose of ultimately bringing all the taxpayers of the state within the actual operation of a system of equality, must, in the accomplishment of the purposes for which the commission was created employ counsel and other expert assistants and entail other expenses which no Legislature can foresee. Recognizing this, the Legislature, in the act amending section 2218 of the Code (Gen. Acts, 1911, p. 550) struck from said section the limitation of \$3,000, leaving the amount to be paid by the commission to "experts, stenographers, engineers or assistants" to the sound judgment of the commission, subject to the approval of the Governor. The Legislature, in providing that the salaries of the commissioners and the secretary, should be paid as other salaries of state officials are paid, meant that those salaries should be paid in monthly installments, without limitations upon them just as the salaries of other state officials are paid, and it was not the intention that this commission, when confronted with the performance of a duty, should fail to perform it, because of a fear that if they did perform it they would be left without salaries. The expenses, the Legislature knew, must be paid, not monthly, but as they arise, and for that reason this fund, limited to \$25,000 per annum, was appropriated to be used by commissioners, selected in a manner the Legislature

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deemed wise, in their sound judgment, subject to the approval of the Governor, as the necessities of the state might require.

4. It follows from what we have above said that, in our opinion, the trial court committed reversible error in sustaining the demurrer to the petition of appellant.

The judgment of the trial court is therefore reversed, and the cause is remanded to the court below for further proceedings in accordance with this opinion.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur. SAYRE, SOMERVILLE, and GARDNER, JJ., dissent.

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Mandamus.

(Decided July 25, 1914. 66 South. 146.)

1. *Mandamus; Grounds; Control of Discretion.*—Except in extraordinary cases for gross abuse of discretion the exercise of the trial court's discretion in granting a continuance will not be controlled by mandamus.

2. *Landlord and Tenant; Rent; Attachment; Continuance.*—Under sections 2924, 2961, Code 1907, made applicable to attachments by a landlord by section 2751, Code 1907, the court properly granted the continuance in a cause wherein an attachment was sued out by a landlord to enforce his lien for rent not yet due when the cause was continued.

ORIGINAL application in Supreme Court.

Application by the Seals Piano & Organ Company for a writ of mandamus directed to the Honorable W. W. Pearson, judge of the circuit court, to require him to annul and set aside an order made by him continuing an attachment proceedings. Mandamus denied.

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W. A. GUNTER and TILLEY & ELMORE, for appellant. The affidavit was insufficient as a basis for any attachment, and this is the initiatory step, and the foundation of the whole proceeding.—§ 4747, et seq., Code 1907; Drake on Attachment, §§ 83-4; *Flexner, et al. v. Dickerson*, 65 Ala. 130. The statute cannot operate for rent not yet due except on affidavit of the existence of one of the three grounds.—*Nicrosi v. Roswald*, 113 Ala. 592; *Staggers v. Washington*, 65 Ala. 225; *Knowles v. Steed*, 79 Ala. 428. Petitioner is possessed of an unqualified right to the special writ of mandamus or prohibition.—*Ex parte Cole*, 28 Ala. 50; *Ex parte Robbins*, 29 Ala. 71; *Ex parte Morgan*, 30 Ala. 51; *First N. Bank v. Cheney*, 120 Ala. 117.

RUSHTON, WILLIAMS & CRENSHAW, for appellee. A motion to dismiss an attachment is addressed to the sound discretion of the trial court, and cannot be reviewed by mandamus.—*Ex parte Putnam*, 20 Ala. 592; *Ex parte Bottom*, 46 Ala. 312; *Busbin v. Ware*, 69 Ala. 279; *Mohr v. Chaffee*, 75 Ala. 307; *Ex parte McKissack*, 107 Ala. 403. An appeal after final judgment furnishes an adequate remedy.—*Board of Revenue v. B'ham W. W. Co.*, 160 Ala. 152, and authorities supra.

MAYFIELD, J.—This is an original application to this court, for a writ of Mandamus directed to Hon. W. W. Pearson, judge of the circuit court for Montgomery county, commanding and requiring him to set aside and annul an order made by him, continuing the trial of the cause pending in the circuit court of Montgomery county, wherein N. J. Bell et al. are plaintiffs and the Seals Piano & Organ Company is defendant, and to proceed with the trial of the cause. The action was one of attachment, instituted by N. J. Bell et al., as landlords,

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against the Seals Piano & Organ Company as tenant. The object of the attachment was to collect rent due and to become due under a contract of rental, made between the parties, of certain storehouses in the city of Montgomery, Ala. The action was instituted under article 3, c. 106, §§ 4747-4752, of the Code.

Section 4748 of the Code reads as follows: "The landlord shall have the right, for the enforcement of such lien, to sue out an attachment before any officer authorized to issue attachments, and returnable to any court having jurisdiction of the amount claimed, when the rent, or any installment thereof, is due, and the tenant fails or refuses, on demand, to pay such rent or installment; and also in the following cases, whether due or not:

"(1) When the tenant has fraudulently disposed of his goods, or is about to fraudulently dispose of his goods.

"(2) When the tenant has made an assignment for the benefit of his creditors.

"(3) When the tenant has made a complete transfer of all, or substantially all, of his goods, without the consent of the landlord, or without first having paid the rent in full for the term."

Section 4749 of the Code reads as follows: "Before such attachment is issued, the plaintiff, or his agent or attorney, must make affidavit, setting forth the amount that is, or will be, due for the rent, that one of the causes for issuing an attachment prescribed in the preceding section exists, and that the attachment is not sued out for the purpose of vexing or harassing the defendant; and must also execute a bond in double the amount claimed, payable to the defendant, with sufficient surety, and with condition that the plaintiff will prosecute the attachment to effect, and pay the defendant all such

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damages as he may sustain from the wrongful or vexatious suing out of such attachment."

The affidavit in this case reads as follows: "The State of Alabama, Montgomery County. Before me, M. C. Mixon, a notary public, in and for said county, personally appeared N. J. Bell, who being duly sworn deposed and saith, that Seals Piano Company, will be justly indebted to N. J. Bell, W. V. Bell and Annie B. Burkhead, as trustees under the will of N. J. Bell, deceased, in the sum of twenty-three hundred and ten dollars, after allowing all just offsets and discounts, and that the said indebtedness is for rent of two stores in the city and county of Montgomery, Alabama, and that an installment of rent for said stores is due and said tenant has failed or refused on demand to pay such installment and that this attachment is not sued out for the purpose of vexing or harassing the said defendant, or other improper motive.

"Sworn to and subscribed before me, this 7th day of August, A. D. 1913.

"M. C. Mixon, Notary Public."

The attachment was issued and levied upon a lot of pianos, and the defendant executed a forthcoming bond, and interposed a plea in abatement, upon the grounds that the affidavit was not made by the plaintiffs or their agents, that the debt or demand was not described therein, and that the affidavit failed to state any valid or legal ground for the issuance of the attachment. The plaintiffs interposed demurrers to this plea, assigning various grounds therefor. The defendant then made a motion to dissolve or quash the attachment, setting up substantially the same matters that were alleged in the plea, with the additional ground that no complaint had been filed. The plaintiffs objected to the filing of this motion, and moved the court to strike it.

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assigning various grounds for the counter motion, among them, that a plea in abatement had been filed because the motion did not allege that the plaintiffs' demand was due, and generally that the motion showed no ground for dissolving or quashing the attachment suit. The court sustained the demurrer to the plea in abatement, declined to dissolve or dismiss the attachment, and continued the case upon the ground that the cause was not at issue because, we suppose, the demand sued upon, or all of it, was not then due or payable. To the action of the court in thus continuing the cause, the defendant excepted; and applies to this court for mandamus to require the judge to set aside his order and proceed to trial.

This is evidently not a proper case for the awarding of a peremptory mandamus to the circuit judge to set aside the order of continuance, and to proceed to a trial of the cause. Aside from the merits of this particular controversy, or the correctness of the ruling of the trial court in this particular case, the continuance of a cause rests largely in the discretion of the trial court; and this discretion will not be controlled by mandamus, except in extraordinary cases for gross abuse thereto.—1 Brick. Dig. 774, § 2; *Ex parte Jones*, 66 Ala. 204.

In *Ex parte City of Montgomery*, 24 Ala. 98, 99, speaking through CHILTON, C. J., this court had to say: "Should this court interpose its jurisdiction to control the inferior courts in the exercise of their discretion, either in the making or continuing of interlocutory orders, or in refusing to make them, in the progress of causes, it would be difficult to calculate the delay, embarrassment, and inconvenience which would result, not only to suitors, but to the courts themselves. If every order of continuance, every refusal to grant new trials, and the numerous interlocutory orders which are made

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in causes, both at law and in equity, from their inception to their final termination, could each be made distinct subject-matter for an appeal to this court, at the hazard of a heavy bill of costs, this court would become an intolerable grievance, and there would be no end to the litigation to which a cause, requiring a great number of such orders, might be subject."

And in the subsequent case of *Ex parte South & North Alabama Railroad Co.*, 44 Ala. 654, 656, the above excerpt from *Ex parte City of Montgomery* was quoted approvingly by Peters, J., with these remarks: "It is very evident that if this court should assume, by mandamus, to interfere in the control of *one* matter of discretion in the exercise of their jurisdiction by the inferior courts of the state, it might interfere with *all* matters of a like character. Then every contested order for a continuance, in every court of the state, would in this way, sooner or later, be brought here for review. This would be an *intolerable grievance* indeed. Such has not heretofore been considered the office of the important writ of mandamus. It is not granted to control matters of discretion.—24 Ala. 98, 99, *supra*; *Gray v. Bridge*, 11 Pick. [Mass.] 189; *Ex parte Fleming*, 4 Hill [N. Y.] 581; *St. Luke's Church v. Slack*, 7 Cush. [Mass.] 226."

Moreover, we are not prepared to say that there was any error of which the defendant can complain. It is made to appear that a part of the debt or demand sued on was not due when the attachment was sued out, nor when the cause was continued.

The law authorizes attachments to be sued out for debts or demands that are not due, as well as for those that are; but, of course, a judgment should not be taken until the demand is due.—Code, § 2924, subd. 1. Section 2961 of the Code provides that if the attachment is

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issued upon a demand not then due, the cause shall not stand for trial, nor shall the plaintiff be required to file his complaint, until such demand is due and payable.

—*Jones v. Holland*, 47 Ala. 732; *Perkerson v. Snodgrass*, 85 Ala. 137, 4 South. 752.

While the two sections of the Code above referred to, relate to general attachments, yet section 4751 of the Code makes such provisions applicable to attachment by the landlord, to enforce his liens for the rent of storehouses and other buildings, and therefore they are applicable to this case.

It therefore follows that the application for mandamus must be denied.

Mandamus denied.

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Mandamus.

(Decided June 30, 1914. 68 South. 22.)

1. *Equity; Pleading; Amendment; Different Causes.*—The original bill and the amendment offered thereto stated and considered, and it is held that in view of the provisions of section 3126, Code 1907, the Chancellor erred in refusing the amendment, as it did not change the purpose of the original bill, or make a new case.

2. *Same.*—Under the provisions of section 3126, Code 1907, it is not enough that the amendment offered may make a mere inconsistency or repugnancy of allegation, but there must be an inconsistency or repugnancy of the purposes of the bill as contradistinguished from a modification of the relief in order to render the proposed amendment objectionable.

ORIGINAL petition in Supreme Court.

Petition by A. Delpey, Sr., for mandamus directed to Honorable A. H. Benners, as Chancellor, to require him to allow an amendment to a bill filed by the petitioner against the Thompson Realty Company. Writ awarded.

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BEDDOW & OBERDORFER, for appellant. Complainant was entitled to have the amendment to the bill as prayed for, and the chancellor was in error in declining to grant it.—§ 3126, Code 1907; *Pitts v. Poicledge*, 56 Ala. 147; *Jones v. Reese*, 65 Ala. 144; *Smith v. Gordon*, 136 Ala. 495; *Gulf C. & C. Co. v. Ala. C. & C. Co.*, 145 Ala. 628; *Bledsoe v. Price*, 132 Ala. 621; *Ala. T. Co. v. Hall*, 152 Ala. 262. The case of *Smith, Rec. v. Gordon*, *supra*, is conclusive.

A. & F. B. LATADY, for appellee. The amendment offered was a departure from the bill, and not allowable.—*Leggett v. Bennett*, 48 Ala. 380; *Penn v. Spence*, 54 Ala. 35; *Winter v. Quarles*, 43 Ala. 693. Counsel discuss the authorities cited by appellant with the insistence that unless carefully considered, might be held to be authorities supporting petitioner's contention, but when properly differentiated, will be found not to do so.

MCCLELLAN, J.—The single question presented by the petition for the writ of mandamus and the answer to the rule nisi is whether the amendment of the original bill, denied allowance by the chancellor, proposed a *departure* from the original bill. The original bill averred that in 1904 complainant purchased by lease-sale contract a lot, with the improvements thereon; that the contract, exhibited with the bill, was signed "Thompson Realty Company, by J. Cary Thompson, Manager;" that complainant went into possession of the property in 1904, and has been continuously since in possession thereof; that the Thompson Realty Company was a corporation; that in 1909, while complainant was in possession of the house and lot under the lease-sale contract and claiming to own it, Thompson Realty Company mortgaged the premises to Mrs. Sarah E. Nabers,

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to secure a loan from her; and that Mrs. Nabers took the mortgage charged with notice of complainant's title and equity by reason of his possession of the premises at the time the mortgage was executed. It was also averred in the original bill that complainant had fully paid all of the purchase price stipulated in the contract, or, if mistaken as to that, that he has paid a sum which entitled him to a warranty deed as provided in the contract; that the Thompson Realty Company has failed and refused to deliver the deed to him, although complainant has been and is ready and willing to execute all notes and mortgages for the balance of the purchase price as provided in the lease-sale contract. In this original bill Thompson Realty Company, a corporation, and Mrs. Nabers are named as the parties defendant. The prayer was that the mortgage be declared a cloud on complainant's title or, in the alternative, that it be made subject to complainant's prior equities. Mrs. Nabers answered the original bill, and among other things asserted that she was not advised of the existence of the Thompson Realty Company, a corporation, and that she did not hold any mortgage from that corporation; but that she had accepted and held a mortgage on the property executed by J. Cary Thompson, and his wife, Mabel B. Thompson, said J. Cary Thompson being the owner thereof.

The proposed amendment, which the chancellor denied, would change the bill so as to strike out the Thompson Realty Company, a corporation, as a party defendant; to make J. Cary Thompson and Mabel B. Thompson parties defendant; to aver that J. Cary Thompson employed the name Thompson Realty Company as a trade-name; and to aver "that heretofore, on, to wit, the 12th day of September, 1912, J. Cary Thompson conveyed the above-described property to his wife,

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Mabel B. Thompson, who received said conveyance with full knowledge and notice of the said equities, right and title of your complainant." Under established rules of practice the chancellor erred in refusing to allow the amendment.

Section 3126 of the Code provides: "Amendments to bills must be allowed at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief. * * *"

The only limitation, as at present important is that the amendment shall not effect to make a new case. The statute itself is "broad and liberal," and its administration has been and must continue to be characterized by the same liberal spirit and beneficent purpose that inspired its adoption.—*Pitts v. Powledge*, 56 Ala. 147. In *Ingraham v. Foster*, 31 Ala. 132, it was said: "To make an amendment improper, it is not enough that there be a mere inconsistency, or repugnancy of allegation; there must be an inconsistency or repugnancy of the purposes of the bill, as contradistinguished from a modification of the relief. One of the purposes of a chancey amendment is to correct an erroneous statement of the facts."

This particular pronouncement was reiterated in *Alabama Terminal Co. v. Hall & Farley*, 152 Ala. 269, 44 South. 592. Its doctrine was again expressed in *Fite v. Kennamer*, 90 Ala. 473, 7 South. 920, where it was also pertinently said: "New matter or new claim may be introduced, entitling complainant to additional or different relief from that specially prayed in the original bill, if it is not repugnant to its prayer and purpose."

And it was also there further observed: "Whether the original bill contained equity—whether it presented a case of which the court could take cognizance, en-

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titling complainant to relief—is not a material inquiry.”

As appears, if the amendment proposed effects no departure from the *purpose* of the original bill, it should be allowed. The amendment here proposed undertook to conform the allegations of *facts* to the facts as the pleader now takes them to exist. The purpose of the original bill was to relieve, to protect, and to vindicate the asserted rights of the complainant in the lot described therein. If the amendment had been allowed, it would have wrought no change from that purpose. Its only effect, as far as the present inquiry is concerned, would be to change the description of the *source* of the complainant's rights in and to the lot, and to change the description of the *source* of the asserted unjustified creation of a cloud upon his rights in said lot. Obviously, such effort at conformation of allegation to fact—plainly unaltering of the purpose for which the original bill was filed—cannot be pronounced such a departure, in any degree, as to justify the disallowance of the amendment proposed.

The writ of mandamus prayed for must therefore be awarded.

Writ awarded.

ANDERSON, C. J., and SAYRE. SOMERVILLE, and DE GRAFFENRIED, JJ., concur.

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Injunction to Prevent Whisky Nuisance.

(Decided June 30, 1914. 60 South. 115.)

1. *Commerce; Regulation; Statutes; Construction.*—The Fuller Bill (Acts 1909, p. 63), prohibits intrastate shipments of intoxicating liquors, except when made for purposes therein stated, but does not attempt to prohibit interstate shipments.

2. *Same; Federal Statutes; Construction.*—The Webb Law (37 Stat. 699) does not prohibit the transportation of intoxicating liquors from one state into another, except where the liquors are to be received, possessed, or in some way used as prohibited by the laws of the latter state, and from such liquors so imported it merely withdraws their interstate character and their immunity from state regulations, and as so construed, it is a valid exercise of the power of Congress to regulate interstate commerce.

3. *Same; Liquor Traffic; Prohibition.*—Under the Webb Law, the Carmichael Bill (Acts 1909, p. 8), and the Fuller Bill (Acts 1909, p. 63), an interstate carrier is not prohibited from bringing into the state intoxicating liquors, except only such as are intended for unlawful use in the state, and a carrier in possession of liquors for delivery to a person who intends to use the same in violation of the state law, or a carrier delivering in a state liquor to a person in the state intending to use the same illegally, violates the state law, unless it has no knowledge of such unlawful purpose.

4. *Intoxicating Liquors; Prohibition; Statute.*—The Carmichael and Fuller Bills cover, within the state, all liquors which no person can lawfully have in his possession, and since the passage of the Webb Law, interstate traffic in such intoxicating liquors for unlawful use in the state is prohibited.

5. *Same; Regulation.*—Under the Federal penal code, section 240, 35 Stat. 1137, a common carrier of interstate commerce is apprised of the character of the shipment when intoxicating liquor is received by it, and under the Webb Law, before it delivers the liquor to the consignee in the state, it should inform itself of the purpose of the consignee, and where it has liquor in its possession for delivery to a person intending to use it in violation of a state law, or actually delivering it in the state to such person, such carrier is presumptively guilty of a violation of the law of the state.

6. *Same; Violation; Injunction; Bill.*—A bill by the state against an interstate carrier to enjoin the maintenance of a liquor nuisance which alleges that the carrier has warehouses where goods received are stored to await delivery to the consignee; that "prohibited liquors" are received at the warehouses in large quantities, and at frequent intervals, for delivery to individuals for illegal purposes; that prohibited liquors are received by the carrier for distribution or delivery contrary to the laws of the state, and that it is main-

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taining a liquor nuisance, charges a violation of the law by the carrier authorizing injunctive relief; the words "prohibited liquors" meaning intoxicating liquors, which under the Acts of 1907, p. 71, Special Session, the carrier has not the legal right to have in its possession.

7. *Same*.—Where a carrier of interstate commerce, in good faith, and after proper investigation, delivers liquor to a consignee without knowledge that the same is intended by the consignee for illegal use in the state, the carrier does not violate any of the laws of the state.

8. *Same; Nuisance; Injunction*.—To justify a departure from the rule that an injunction should be dissolved on a sworn answer denying the averments of the bill, it must be apparent that irreparable mischief will follow, or some circumstance peculiar in its nature must exist; where a carrier, respondent in a suit, to enjoin it from maintaining a liquor nuisance, alleges under oath that it has not in any way acted in violation of any laws of the state by engaging in interstate commerce in liquors, a preliminary injunction restraining it should be dissolved.

APPEAL from Morgan Law and Equity Court.

Heard before Hon. THOMAS W. WERT.

Suit by the State, by its solicitor, against the Southern Express Company to enjoin the maintenance of a whisky nuisance. From a decree overruling demurrers to the bill, and a motion to dissolve a temporary injunction, defendant appeals. Reversed, rendered, and remanded.

The bill alleges in effect that the Southern Express Company is a common carrier in and through Morgan county, Ala., doing an inter and intra state business, and in Decatur and other points in said county it maintains depots, warehouses, or storage places where goods received by it destined for Decatur are kept or stored until they are delivered to consignees, and that it keeps in said depots, warehouses, or storage places prohibited liquors for distribution or delivery contrary to the laws of the state; that it has frequently received at such warehouse or storage place whisky to be delivered to John Milligan and Ellis Wright in Morgan county, Ala., and that such shipments have been received in large quantities and at frequent intervals. and that said liquors are

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kept and stored in such warehouses in large quantities and at frequent intervals to be delivered to individuals for illegal purposes, and that it has maintained a common nuisance or liquor nuisance in violation of law. It is then alleged that it is not a druggist, and does not keep a drug store or maintain a drug store at the above-mentioned storehouses or warehouses, and that the buildings above mentioned are not used exclusively for warehouses. Answering the bill, the express company admitted that it was a common carrier in and through Morgan county, and that it maintained depots and warehouses as charged in the bill at Decatur, where goods received by it for transportation or delivery to persons in Morgan county are stored and kept in pursuance of the contract of transportation. That it is a common carrier engaged in intra and inter state transportation, and under its duty as such is bound to receive and transport shipment of liquors from points without the state of Alabama to points within the state, but that these liquors were not intended to be received, possessed, sold, or otherwise used in violation of law so far as this respondent is advised, and it denies that it has or keeps on hand prohibited liquors or stores prohibited liquors in Morgan county, or that it is maintaining a common or liquor nuisance in violation of the law. Then follows a detailed statement of the character of the shipments made to the persons named in the bill, and the conferences held between this corporation and the representatives of the state of Alabama as to the shipment right, it being alleged that the shipment to Milligan had been delivered before this corporation was informed that the shipment was for illegal purposes. The answer admits that the corporation is not a druggist and does not keep a drug store at the places mentioned in the bill. The bill then sets up the interstate commerce regulation and the in-

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terstate commerce clause of the Constitution, and that the bill seeks an injunction against the lawful and orderly conduct of lawful interstate commerce regulation and the interstate commerce clause of the Constitution, and that the bill seeks an injunction against the lawful and orderly conduct of lawful interstate commerce, and that the Webb bill does not confer upon the agent of the state of Alabama, nor upon the state itself the power contended for in the bill, and that the said bill known as the Webb bill, or as the Webb-Kenyon bill, is unconstitutional and void, as violative of article 1, section 8, article 4, section 2, and of the Fourteenth amendment of the Constitution of the United States, and because it undertakes to subject this defendant to loss of property and property rights because some person other than this defendant entertains an intent to violate the laws of the state, to which said shipment was destined, and because it attempts to give extraterritorial effect to the laws of the state, and to enable that state to annul and defeat contracts made without the state of Alabama and to deprive this defendant of its property rights to carry such shipments as interstate commerce.

ROBERT C. ALSTON and EYSTER & EYSTER, for appellant. In the absence of some circumstances peculiar to the case, or where irreparable mischief will result, a temporary injunction should be dissolved upon the filing of the sworn answer containing unequivocal denial of all the charges on which the right to an injunction rests. —*Johnson v. House*, 154 Ala. 496; *Weeks v. Bynum*, 158 Ala. 231; *Long v. Shepherd*, 159 Ala. 595; *Rogers v. Bradford*, 29 Ala. 474; *Hartley v. Matthews*, 96 Ala. 226; *L. & N. v. Philyaw*, 94 Ala. 463; 22 Cyc. 988. The answer shows that the shipments were interstate shipments, and that the court was powerless to prevent these

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deliveries under the statements of fact in the answer.—135 U. S. 100; 223 U. S. 70; 129 Ky. 420; 170 U. S. 412; 203 U. S. 270. Counsel insists that the Webb-Kenyon Law is unconstitutional.—*L. & N. v. Cook B. Co.*, 223 U. S. 70; 170 U. S. 412; 170 U. S. 438; 5 How. 504; 125 U. S. 465.

R. C. BRICKELL, Attorney General, T. H. SEAY, Assistant Attorney General and MELVIN HUTSON, for appellee. No brief reached the reporter.

DE GRAFFENRIED, J.—The Carmichael bill (Acts Sp. Sess. 1909, pp. 8-13) and the Fuller bill (Acts Sp. Sess. 1909, pp. 63-96) are expressive of the law of this state on the subject of intoxicating liquors and beverages, except in so far as their provisions have been expressly or impliedly repealed by the Parks bill (Gen. Acts 1911, pp. 26-31) and the Smith bill (Gen. Acts 1911, pp. 249-288).—*Southern Express Co. v. I. Brickman Co.*, 187 Ala. 637, 65 South. 954; *State ex rel. Crumpton v. Montgomery*, 177 Ala. 212, 59 South. 294; *Western Railway v. Capital Brewing Co.*, 177 Ala. 149, 59 South. 52; *Hauser v. State*, 6 Ala. App. 31, 60 South. 549.

The Fuller bill prohibits intrastate shipments of intoxicating liquors and beverages, except when such shipments are made for certain recognized legal purposes, and the provisions of the Fuller bill are now operative as to such shipments in all parts of the state except those embraced within the territory in "wet towns or cities."—*Southern Express Co. v. I. Brickman Co.*, *supra*. The Fuller bill does not, however, prohibit or attempt to prohibit, the transportation of intoxicating liquors or beverages from some other state or territory into the state of Alabama.—Section 24, Fuller bill, pp. 86, 87,

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Acts Sp. Sess. 1909; *Southern Express Co. v. I. Brickman Co.*, *supra*.

The Legislature, in adopting the Fuller bill, recognized that when an article is delivered to a common carrier in one state, for transportation to and delivery in another state, such article is—so far as the question now under consideration is concerned—from its receipt by the common carrier until its orderly delivery to the consignee, within the sole jurisdiction of the federal government, and that it does not come within the jurisdiction of the state to which it is shipped until, in due course of business, it is delivered to the consignee.

(2) Since the adoption of the Fuller bill the Congress of the United States has adopted what is familiarly known as the "Webb Law."—Act March 1, 1913, c. 90, 37 Stat. 699. This bill was passed, over the veto of the President, in March, 1913, and is in the following language: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the shipment or transportation in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, including beer, ale, or wine, from one state, territory, or district of the United States or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, directly or indirectly or in any manner connected with the transaction, to be received, possessed, or kept, or in

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any manner used, either in the original package or otherwise, in violation of any law of such state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, enacted in the exercise of the police powers of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited; and any and all contracts pertaining to such transactions are hereby declared to be null and void, and no suit or action shall be maintained in any court of the United States upon any such contract or contracts, or for the enforcement or protection of any alleged right based upon or growing out of such contract or contracts, or for the protection in any manner whatsoever, of such prohibited transactions."

The above act, by its terms, does not prohibit the transportation of intoxicating liquor from one state into another state except upon the contingency that the liquor is to be *received*, *possessed* or *sold* or in some way used in a manner prohibited by the laws of the state into which such liquor is to be, or is in fact, imported. The above act, by its terms, divests intoxicating liquor of its "interstate character," and withdraws from it "interstate protection" at the hands of the federal government only when it is shipped from one state into another state for purposes which, under a valid statute of the state into which it is shipped, are illegal in the state into which it is shipped. In other words, under the terms of the above quoted act, intoxicating liquor, as an article of interstate commerce, is not an outlaw. It is however, as such an article, under certain conditions, an outlaw.

(3) Prior to the passage of the act of Congress approved August 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177), entitled "An act to limit the effect

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of the regulations of commerce between the several states and foreign countries," a sale, in the original package in which the article was shipped, by the person who imported the article from one state into another state, was an incident of interstate commerce, and the state into which the article was imported could not prohibit such sale.—*Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

The above doctrine grew out of the fact that the states, in adopting the Constitution of the United States, vested in Congress the exclusive power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," except, indeed, such power as relates to subjects which "do not require the application of a general or uniform system."—*Leisy v. Hardin*, *supra*.

"Where the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress; but where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers which have full operation unless or until circumscribed by the action of Congress in effectuation of the general power."

In other words, from the adoption of the federal Constitution it has ever been held that the power of Congress "to regulate commerce among the states, when the subjects of that power are national in their nature, is exclusive." It has also been held that "the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several

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states.”—*Robbins v. Shelby County Taxing District, supra*; *Wilkerson v. Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

When, therefore, the Legislature of this state, through the Carmichael bill and the Fuller bill, made it unlawful to sell or give away intoxicating liquors or to transport them except for certain purposes, from any point in the state to any other point in the state, it in no way, in recognition of the above federal power, attempted to prohibit the shipment of intoxicating liquor from another state into this state.

The stringent prohibition laws which became operative in all parts of this state upon the adoption of the Carmichael and Fuller bills to which we have above referred are general laws now operative, as we have already said, in *all* parts of the state, except where an *exception* has been ingrafted upon them through the operation of the Parks and Smith bills, to which reference has also been made. In a few of our towns and cities—not counties—intoxicating liquor may now, within the territory embraced within the corporate limits of such towns and cities, under restrictions which at no previous time have prevailed in the state, be sold. The manner in which, under the provisions of the Parks and Smith bills, the wet cities and towns have been able, through the votes of the people of the counties in which such towns and cities are situated, to except themselves from the general prohibition laws of the state gives emphasis to the public policy of the state to discourage the use and consumption of intoxicating liquors within the state. In furtherance of that policy, it is, except in wet cities and towns, not only unlawful to manufacture, keep for sale, or have in possession for disposition in any way, or sell, give away, or otherwise dispose of, prohibited liquors, but it is also provided that: “The keep-

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ing of liquors or beverages that are prohibited by the law of the state to be manufactured, sold, etc., in any building not used exclusively for a dwelling shall be prima facie evidence that they are kept for sale, or with intent to sell the same, contrary to law."

The only protection, in short, which is accorded to intoxicating liquor in the dry territory of the state, except to that which is had for personal use, for the use of druggists, etc., and for communion purposes, is the protection which is accorded to it by the federal laws governing the subject of interstate commerce.

(4) The Webb bill, which we have above quoted, outlaws intoxicating liquors which are shipped into this state from another state, and which are shipped into this state for illegal purposes. Intoxicating liquors which are shipped into this state from another state for illegal purposes are therefore, in so far as this state is concerned, not the subjects of interstate commerce. They are outlaws, and are to be dealt with by the courts as such. Such liquors are not now recognized as legitimate subjects of transportation, and a common carrier caught in the possession of such liquors, liquors which, under the express terms of the Webb bill, it is prohibited from bringing into this state, cannot escape the operation of the laws of this state by showing its own violation of a federal statute, passed confessedly for the purpose of aiding this state in its policy, through prohibitory laws, of encouraging temperance among all of its people.

The prohibition laws of this state, as they now exist, are sufficiently broad to cover all liquors which no person can lawfully have in his possession, and they became immediately operative upon all liquors shipped for illegal purposes into this state from other states, upon the passage of the Webb bill.

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“This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon the articles occupying a certain situation until the passage of the act of Congress. The act, in terms, removed the obstacle, and we perceive no reason for adjudging that a reenactment of the state law is required before it can have the effect upon imported liquors which it has always had upon domestic property.”—*Wilkerson v. Rahrer, supra; Tinker v. State*, 90 Ala. 638, 8 South. 814.

While section 24 of the Fuller bill deals only with the intrastate shipments, and renders unlawful all shipments of intoxicating liquors, except shipments to druggists, physicians, etc., and while section 36 of the Fuller bill declares that our prohibitory laws shall be so construed as to avoid conflict with “that clause of the Constitution of the United States which confers upon the Congress of the United States the power to regulate commerce with foreign nations and among the several states and with the Indian tribes,” a proper construction of the Fuller bill must lead to the conclusion that it was the purpose of the Legislature in that bill to declare that it should be unlawful for any person to have in his possession, or to deliver to any other person at any point in the state, liquors not within interstate protection and which were intended for unlawful use. The construction which is thus placed by us upon the Fuller bill is that construction which is in accord with the well-recognized public policy of the state, and which is enjoined, in section 37 of the Fuller bill, upon all courts in the following language: “This act shall be liberally construed so as to accomplish the purpose thereof, which is to further suppress the evils of intemperance and se-

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cure obedience to and the enforcement of the laws of the state for the promotion of temperance and for the suppression of the manufacture of and traffic in prohibited liquors and beverages and to prevent evasions and subterfuges by which such laws may be violated."

For the reasons above stated we are of the opinion that *interstate* commerce cannot, since the passage by Congress of the Webb law, be used as a subterfuge by common carriers or other corporations, firms, or persons for having in their possession or for delivering to any other person liquors intended to be used, not for lawful, but for unlawful, purposes in the state.

"That which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States."—*Peirce v. New Hampshire*, 5 How. 504, 12 L. Ed. 256; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

Intoxicating liquors and beverages intended for unlawful use in Alabama are, in so far as the state of Alabama is concerned, since the passage of the Webb bill, not articles of commerce, and cannot claim protection as such.

(5) That the laws of this state which have been passed for the purpose of promoting temperance are violative of no provision of the state or federal Constitution is a proposition about which there is no room for doubt.—*Mugler v. Kansas*, 23 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. Congress in adopting various prohibitory laws with reference to sales, etc., of intoxicating liquors to the Indians, has clearly indicated that, in the opinion of the federal government, such laws subserve a not unwise public policy when applied to certain localities and peoples under the peculiar protection of the feder-

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al government.—*Farrell v. United States* (C. C. A. 1901) 110 Fed. 942, 49 C. C. A. 183.

One of the chief stumbling blocks in the way of the enforcement of local option and prohibitory laws in our various states has been the fact that, while the states could prohibit intrastate commerce in prohibited intoxicating liquors, they were without protection against interstate shipments until the liquors so shipped had found their way into the general mass of property of the state. Experience in prohibition and local option states indicated that, so long as the consignee was under the interstate commerce law, permitted to sell intoxicating liquors in original packages, such liquors found their way, upon the sale by the consignee in the original packages, into channels which were subversive of the public policy of the state which dictated its prohibitory and local option laws. The result was that Congress passed the act of August 8, 1890, to which we have above referred, and which was upheld as constitutional in *Ex parte Rahrer, supra*.

Experience has demonstrated that local conditions in some of our states present problems which in other states do not exist, and that laws which are necessary in some states are needless in others. It is therefore appropriate that, under the broad powers which have been expressly lodged in Congress as the sole custodian of interstate commerce, such regulations of that commerce shall be had at the hands of that body as will assist the various states in enforcing valid statutes enacted by them in furtherance of a public policy which is dictated by their several peculiar needs.

“The power over commerce with foreign nations and among the several states is vested in Congress as *absolutely* as it would be in a *single government*, having in its constitution the same restrictions on the exercise of

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power as are found in the Constitution of the United States.”—*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Northern Securities Co. v. United States*, 193 U. S. 341-352, 24 Sup. Ct. 436, 48 L. Ed. 679.

The power of a state to prohibit the transportation of intoxicating liquor from a wet part of a state into a dry part of a state, and to be there used in violation of law, is, as we have already said, unquestioned. In this state a large number of our counties are dry counties, and the Legislature of the state, out of respect to the wishes, the needs, and the efforts of a majority of the people in those counties to promote and encourage soberness and temperance, has validly declared that intoxicating liquor shall, except to druggists, etc., not be shipped from any point in the state into those counties. Why, then, if the United States government possesses, in fact, exclusive control over interstate commerce, that government, to meet the needs and efforts of the states to discourage the use of intoxicating liquors, does not possess the power to outlaw from the protection of federal commerce liquors intended for use in such states in contravention of their laws we are unable to see. The power to which we refer must be lodged somewhere. It is not in the states, because they expressly surrendered their power in the premises when they adopted the Constitution. The powers which the states surrendered when the Constitution was adopted were lodged by them in the federal government, and were by the states expressly “vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” The powers vested in Congress, a legislative body, were vested in it in order that the Congress, on the subjects placed within its jurisdiction, might so legislate on such subjects as to promote the general welfare. Congress is not authorized by the Constitution to delegate leg-

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islative power to a state, or to any other body, but it has, in several cases, been held to possess the power by general laws, to so regulate certain subjects of interstate commerce as to bring them within the operation of valid statutes of the various states adopted as police regulations of such states, and it has also been held that the mere fact that the states do not possess uniform police regulations in no way affects the validity of such power.—*In re Rahrer, supra*; *State v. McCarty*, 5 Ala. App. 212, 59 South. 543.

In construing the commerce clause of the federal Constitution, the courts have uniformly held that, in the absence of congressional legislation on the subject, the clause in no way conflicts with the police power of a state to prevent the introduction of noxious articles, for the "protection of life, liberty, health or property within its borders," and to that end may "prevent persons and animals suffering under contagious or infectious diseases from entering the state," etc.—*Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23.

Without regard to the reasoning upon which the declaration by the courts, made during the period of inactivity on the part of Congress on the subject now under consideration, that "where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers which have full operation *unless or until circumscribed by the action of Congress in effectuation of the general power*," have been placed by the courts, the real true reasoning underlying the principle is the *necessity* of conceding to the states such power. Without such power the states, in the ab-

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sence of congressional legislation, would not possess the authority which is necessary to the orderly conduct of their affairs, and to the due enforcement of their laws. The courts thus, by a process of wise reasoning, ingrafted upon this clause of the Constitution, out of respect to the necessity of the situation, a *double* construction, as it were, and held that where the subject of commerce is of such a nature as to require different systems of regulation, drawn from local knowledge or experience, it may be the subject of state regulation so long as Congress has not legislated, but that:

“Where the power of Congress to regulate is *exclusive*, the *failure* of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, * * * is repugnant to such freedom.”
—*Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

It was under the above rules of construction that in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, Justices Harlan, Gray, and Brown were of the opinion that, through the effect of the Wilson bill, which was construed by the court in the case of *In re Rahrer*, *supra*, intoxicating liquor was brought within the complete operation of the valid police jurisdiction of a state immediately upon its arrival in such state and *before* its delivery in the original package to the consignee. While, in that case, a majority of the court were of a different opinion, the opinion of the majority was based upon the language of the *act* under review, and not upon constitutional grounds. In other words, in *that* case the majority of the court determined that Congress had not *exercised*, and not that it did not *possess*, a particular power.

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Intoxicating liquor is admitted by all persons to be a subject which, from knowledge and experience, requires, in all localities, some sort of regulation, and while it has been held to be a subject of interstate commerce over which the states have no authority, in the absence of congressional legislation, to deal, nevertheless the same *reasoning of necessity* which actuated the courts in ingrafting upon the commerce clause of the federal Constitution that construction which declared that "where the subject of commerce is of such a nature as to require different systems of regulation, drawn from local knowledge or experience, it may be the subject of state regulation so long as Congress has not legislated," impelled the Congress to pass the Wilson bill, and then, to meet its deficiencies, the Webb bill. The same process of reasoning which impelled the courts to ingraft upon the commerce clause of the federal Constitution the construction which we have just above quoted leads with irresistible logic to the conclusion that when, in adopting the Constitution, the people of the United States conferred upon Congress the broad powers enumerated in the commerce clause of that Constitution, they actually conferred, as a *necessary*, inherent incident of the power, sufficient authority to so regulate by laws needed for the purpose commerce between the states as to *advance* and not to *hinder* such police regulations of the state as are recognized by the federal government, through its courts, as legitimate under the federal Constitution itself, and which police regulations cover such subjects as the common experience of mankind indicates should, in the interest of sobriety, good order, and morality, be made the subject of control at the hands of all enlightened governments. While the citizens of our various states are peculiarly within the protection of their states, they are also citizens of the

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United States, and when they established the federal government and adopted its Constitution for the purpose of promoting, among other things, "the general welfare," and when, in the tenth amendment to the Constitution, they declared that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people," it would appear that, as they, subject to the exception which we have above indicated, vested in Congress for legislative purposes exclusive control over interstate commerce, they intended, *even as against themselves and as against their own acts*, to lodge in Congress the power to control, by direct legislation, in any way it might see proper, those articles of commerce which the common welfare, out of respect to a healthy morality among all the people, demands shall be made the subjects of a not unrestricted commerce among the states. Indeed, it can hardly be contended that the power to which we refer is among the reserved rights of the people, for when the Constitution of the United States was adopted each of our states possessed a representative form of government. In matters of legislation the people of each state acted, not directly, but through their representatives. Each state, as a state, then possessed *absolute legislative control* over the subject of commerce. The *people* of each state had *lodged* that power in the *legislative body* of the state, and that power still remains with the legislative body of the state subject to the limitations imposed by the state and the federal Constitutions, and all power on that subject which does not belong to the state belongs now to the federal government, subject, of course, to the expressed and implied limitations upon that power contained in the federal Constitution.—*Gibbons v. Ogden, supra.*

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In the practical application of the principles growing out of the exclusive power of the federal government to regulate commerce among the states, it has not infrequently occurred that, owing to different police regulations in different states, articles which, under certain conditions, might be shipped into one state could not, under the same conditions, be shipped into some other state. A shipment into the state of Idaho of cattle suffering from *Texas fever* might, at periods, be unlawful because of a police regulation of that state prohibiting such importation at such periods; while a similar shipment into the state of Alabama, because of the absence of such police regulation in the latter state, might be lawful.—*Railroad Co. v. Husen, supra*; *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820. We refer to this simply for the purpose of illustrating our views that the mere fact that, under the Webb law, liquor may be shipped with but few restrictions into some states while it cannot be shipped into other states except under rigid restrictions, presents no obstacle to the operation of that law within the real purpose of the people when they conferred upon Congress, subject only to the limitations imposed by the Constitution itself, exclusive control of interstate commerce. Under the powers possessed by the states they may so regulate intrastate commerce as to meet the reasonable and wise police regulations of their counties, and Congress must possess, under the commerce clause of the federal Constitution, in order that it may meet the growing demands and ever-increasing needs of the people of the nation, a similar power with reference to the reasonable and wise police regulations of the states. No state can, by any law contravene, directly or indirectly, the Constitution of the United States. The laws of the state must, in all things, harmonize with the purposes of the

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people as they have given expression to those purposes in that Constitution. This being true, we can see no reason why Congress cannot, if it sees proper to exercise the power, so regulate, by statute, interstate commerce as to meet the needs of each of our states as those needs find expression in the valid police regulations of each particular state.

"All experience shows that the same measures, or *measures scarcely distinguishable* from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct, to establish their individuality."—*Gibbons v. Ogden, supra*.

In so far as the instant case is concerned, the Webb law, in aid of the public policy of our state, has cut from interstate commerce, in so far as this state is concerned, an article intended for use in the state in violation of a statute which this state, under both the federal and state Constitutions, had the power to enact. In other words, Congress, in whom the people have expressly vested the exclusive power to legislate upon the particular subject, has, "in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other," "in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states."—*Gibbons v. Ogden, supra*.

"Although Congress cannot enable a state to legislate Congress may adopt the provisions of a state on any subject."—*Gibbons v. Ogden, supra*.

And in adopting the Webb law Congress has simply come to the rescue of prohibition and local option states

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against meretricious importations into such states of intoxicating liquors intended for use therein in violation of their laws. The commerce clause of the Constitution was not adopted by the people for the purpose of enabling Congress, by inactivity, to place the subject of interstate commerce within the unbridled license of shippers of all characters of commodities. It was placed in Congress in trust that it would, as the growing commerce and the constantly changing conditions attendant upon a great and busy nation might demand it, so legislate upon, and by such legislation so regulate our interstate commerce by laws of equal and just application, as to best subserve the welfare of all of our people.

"The 'power to regulate commerce' here meant to be granted was that power to regulate commerce which previously existed in the states. But what was that power? The states were unquestionably supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign state. * * * The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive statute. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure."—*Gibbons v. Ogden, supra*.

While the federal government, under the Constitution as originally adopted and the various amendments which have been added to it since its adoption, has not an unbridled power over interstate commerce, the above excerpt from *Gibbons v. Ogden* is authority for the statement that Congress under the federal Constitution possesses all the power over interstate commerce which this state under the federal and state Constitutions possesses over its intrastate commerce. When, in *Gibbons v. Ogden*, the Supreme Court of the United States, in

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construing this clause of the federal Constitution, declared that the Constitution should not be held to "that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent," that court realized that there must be given some flexibility to the practical operation of the law itself, and that a Constitution is to be so interpreted as to carry out the great principles of the government, not to defeat them. —*Hamilton v. St. Louis Co.*, 15 Mo. 3; *State v. McCarty*, 5 Ala. App. 212, 59 South. 543.

While intoxicating liquor is property and an object of constant commerce, it is, as we have already said, an article which is made the subject of some kind of police regulation in every state of the Union. These police regulations are not, it is true, uniform in the various states, but all the states have them. There is therefore a field for the operation of the Webb law in every state of the Union; and, if the federal Constitution, under which this government was established, and which, to use the language of the Supreme Court of the United States in the *Legal Tender Cases*, 110 U. S. 421, 14 Sup. Ct. 122, 28 L. Ed. 204, was "intended to endure for ages and to be adapted to the various crises of human affairs, and is not to be interpreted with the strictness of a private contract," then it would seem that, in adopting the Webb bill Congress was exercising, not an *implied*, but an *express*, power conferred upon it by the Constitution.

"If any one proposition could command the universal assent of mankind, we might expect it would be this: That the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it

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represents all, and acts for all. * * * We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."—*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579. Miller on the Constitution, pp. 142, 143.

While there has always been a difference of opinion as to whether the federal Constitution should receive a liberal or a strict construction, this difference of opinion has been more distinctly pronounced with reference to the *implied*, rather than with reference to the *express*, grants of power by the Constitution. Where the power is *expressly* granted, there has been but little room for debate, and it must be remembered that the inability of the confederated states to regulate commerce with foreign nations with the states, and with the Indian tribes, was one of the principal defects in the Articles of Confederation, which finally led to the adoption of the federal Constitution.—Tucker on the Constitution, p. 520, § 251. In other words, before the adoption of the Constitution the common welfare of the states demanded that there should exist, subject to the limitations imposed by the Constitution, in one body, that exclusive, autocratic power over foreign and interstate commerce which naturally and inherently belongs to all independ-

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ent and well-regulated government. It was this condition which led to the adoption by the states of the commerce clause of the federal Constitution. While, in its adoption, it was, in so far as interstate commerce is concerned, the purpose to "remove the trammels upon transportation between different states and to prevent such trammels in the future," in other words, while the purpose was to facilitate commerce and to secure to the people "equality and freedom in commercial intercourse against discriminating state legislation" (*Railroad Co. v. Richmond, et al.*, 19 Wall. 584, 22 L. Ed. 713), the reasoning of the Supreme Court of the United States in *Gibbons v. Ogden, supra*, in which the opinion was written by Chief Justice MARSHALL, and in *Re Rahrer, supra*, in which the opinion was written by Chief Justice FULLER, clearly irresistibly leads to the conclusion that Congress may under the commerce clause of the Constitution, so regulate interstate commerce as to aid the states in the enforcement of such reasonable police regulations as they, under the federal and state Constitutions, may adopt. Indeed, a careful analysis of the decisions of the Supreme Court of the United States—the only court that has the power to speak authoritatively on this subject—convinces us that the misconceptions as to what that court meant in some of its decisions in referring to the clause of the Constitution now under consideration are due to the fact that Congress has, in a large measure, remained *inactive*; has not seen proper to exercise, by legislation, the full power which in fact it possesses, and that for this reason interstate commerce has, up to the present time, been permitted largely to remain where the Constitution, unaided by congressional legislation, has placed it. A careful comparison of the opinions of the court in the cases of *Gibbons v. Ogden, supra*, *Railroad Company v. Richmond, et al.*,

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supra, *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, *Bowman v. Chicago, etc., Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 29 L. Ed. 502, and *In re Rahrer, supra*, will demonstrate the correctness of this statement. In other words, in many of the cases the courts, in passing upon questions growing out of the commerce clause of the federal Constitution, having no act of Congress to deal with, because of the *inactivity* of Congress on the particular subject, have dealt, *not with the power of Congress to make a particular law*, but with the power of some state, to make a particular law.—*Bowman v. Chicago, etc., Railway Co., supra*; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 456; *Vance v. Vandercook*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. In the case of *Gibbons v. Ogden, supra*, the Supreme Court, however, in plain and comprehensive terms, illustrates the broad powers of Congress under the clause in question, and in the case of *In re Rahrer, supra*, the same court, in terms of equal strength and comprehensiveness, directly addresses itself to the consideration of the power of Congress, by a particular act, passed for the purpose of defending the police regulations of the states, to place limitations upon certain articles of interstate commerce.

Giving to the clause under consideration, not that narrow construction which would render Congress unable to meet the reasonable demands of the police regulations of the states with reference to a subject which every one recognizes should receive constant and watchful regulation, but giving to it that construction which “the words of the grant, as usually understood, import, and which is consistent with the general views and objects of the instrument,” it seems to us that, in enacting the Webb law, Congress exercised a constitutional

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power which was lodged in it for the purpose of defending reasonable police regulations of the state.

“Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies which may arise in the progress of events connected with the rights, duties, and operations of a government. If they could be foreseen, it would be impossible *ab ante* to provide for them. The means must be subject to perpetual modification and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary; to the pressure of dangers or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized at every critical period, and remodeled in every generation, there must be left to those who administer the government a very large mass of discretionary powers, capable of greater or less actual expansion, according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No Constitution can provide perfect guards against it. Confidence must be reposed somewhere, and in free governments the ordinary securities against the abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise, and ultimately in the sovereign power of change belonging to them in cases requiring extraordinary remedies.”—1 Story, Const. p. 324, § 425.

Indeed, if Congress possesses the power to authorize a state, in the exercise of its police power, to confiscate *immediately* upon its delivery to the consignee, intox-

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icating liquors *intended to be sold*, in violation of the laws of such state, *in the original packages*, a power which, in *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, it was declared to possess, we can see no reason why it cannot, with equal propriety and upon the same reasoning, be held to possess the power to vest in a state, under its police power, the right to confiscate such liquors *before* delivery to the consignee. The argument was, until the Supreme Court in the case of *In re Rahrer*, settled the question, that a sale by the consignee was an incident of interstate commerce; that the purpose of the people in adopting the commerce clause of the federal Constitution was to facilitate *trade*, and that to inhibit such a sale would be to destroy the prime object of the people in adopting the clause. The theory that Congress did not possess the power was, however, as we have already said, exploded, and we can see no reason why a common carrier in possession of contraband liquors should be held to possess any higher claim upon the protective feature of the commerce clause of the Constitution than a consignee while in possession of the original package. Protection is furnished the carrier in order that, through him, the legitimate subjects of commerce may find protection until they are delivered to the consignees. In legal contemplation a consignee finds no protection if, *immediately* upon the receipt of his goods, they are in their original packages subject to confiscation at the hands of a state. In legal contemplation he is no better off than he would have been had the goods never reached his hands. So far as he is concerned, the goods might as well have been confiscated in the hands of the carrier, or as to that matter, he is, in legal contemplation, in the same condition as if they had never been accepted by the carrier. We say, *in legal contemplation* because

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as a practical matter a receipt by a consignee of contraband articles in original packages frequently enables him to evade the law and illegally use such packages. The true legal reasons, however, which sustain the Wilson bill also sustain the Webb bill; and, while the Webb bill may, in its practical operation, create some inconvenience to carriers engaged in interstate commerce, these inconveniences grow out of a statute which Congress has seen proper to adopt because of a call of the people of the states for congressional activity on a subject over which, through express grant of the people, Congress has exclusive control. The power to control includes the power to limit. Congress, in the Webb law, has simply placed a limitation upon commerce in so far as intoxicating liquors are concerned, and as a part of such limitation requires common carriers to refuse to accept for transportation, or to deliver to the consignee, that which "is forbidden commerce."—*Gibbons v. Ogden, supra*. Liquor intended for unlawful use in this state is not an article of interstate commerce, and is therefore within the jurisdiction of our laws, not because an act of the Legislature of Alabama has forbidden it to interstate commerce, but because an act of Congress has forbidden it to interstate commerce.—*State v. McCarty*, 5 Ala. App. 212, 59 South. 543.

(6) We have already called attention to our statute which requires that our prohibitory laws shall be so construed as to avoid conflict with the interstate commerce clause of the federal Constitution. We have also called attention to that provision of our laws which declares that: "The keeping of liquors or beverages that are prohibited by the laws of the state to be manufactured, sold, etc., in any building not used exclusively for a dwelling shall be, prima facie evidence that they are

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kept for sale, or with the intent to sell the same, contrary to law."

As common carriers engaged in interstate commerce are not prohibited by the federal laws from bringing into this state all intoxicating liquors, but only such as are intended for unlawful use in this state, the above-quoted provision of the Fuller bill is not applicable to common carriers engaged in interstate commerce. Plainly this provision of the Fuller bill was not, when it was passed, intended to apply to common carriers engaged in interstate commerce, and there is nothing in the Webb bill bringing such carriers within the operation of said quoted section of the Fuller bill. In so far as this state is concerned, its laws have no effect upon liquors brought into this state from another state unless, in contravention of the act of Congress, the carrier has them in its possession for the purpose of delivery or undertakes to deliver them for illegal use in the state. The laws of this state have no extraterritorial force, and the Webb bill was not intended to give to our laws any such force. The state of Alabama has nothing to do with sales that may be made in another state. It is, however, interested in the question as to whether a carrier of interstate commerce shall deliver to a consignee in this state an article which such consignee intends to use in this state in violation of a valid state law. The true, legal effect of the Webb bill, construed in connection with our prohibitory statutes, is to prohibit a carrier engaged in interstate commerce from delivering or having in its possession, for the purposes of delivery to a consignee, liquor which has come into its hands, and which such consignee intends to use in violation of our laws. If liquor intended for unlawful use in Alabama is delivered by the carrier to the person so intending to use it, the act of delivery at once becomes an efficient aid to the crim-

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inal in his intended violation of the law. The act of Congress prohibits the acceptance by a carrier at any point of liquors sought to be shipped to any other point and intended for illegal use at that point; but as liquor, so long as it remains in the actual custody of the carrier, is harmless, this state has no concern with it until it reaches the point of delivery. When it gets there, then, if the carrier delivers it to the consignee, or keeps it in its possession for the purpose of delivering it to the consignee, knowing that the consignee intends to use it in violation of the law, such carrier violates both the letter and the spirit of the laws of the state and of the act of Congress. *These* are the acts of the common carrier of which this state has a right to complain, and these are the acts which, under the Webb bill, are brought within the operation of the prohibitory laws of our state. So interpreted, the doctrine of uniformity of regulations is not violated by the Webb bill and, to use the language of the Supreme Court in *Rhodes v. Iowa, supra*, the Webb bill should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was intended to frustrate. When, therefore, a common carrier in this state is possessed of liquors for delivery to a person who intends to use it in violation of the law, or when, in this state, a common carrier delivers liquor to a person in this state who intends to put it to an illegal purpose, such common carrier itself violates the law of the state and becomes amenable to the state laws for such violation, unless, indeed it is without knowledge as to the unlawful purposes of the consignee. Since the passage of the Webb law the citizen who buys liquor in another state for his own use in this state and the illicit liquor seller who

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makes a similar purchase for illegal purposes in this state do not occupy the same position as to protection under the interstate commerce law.

"The commerce clause of the federal Constitution does not now afford to the carrier the complete protection it formerly did. The carrier must now, if it wishes to avoid being prosecuted, take notice of the use to which it is intended to put the liquor, and, if the use will violate the law of the state at the place of delivery, the carrier may refuse to receive the shipment or, having received it, may refuse to deliver it."—*Adams Express Co. v. Commonwealth of Kentucky*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342.

Under section 240 of the federal Penal Code interstate shipments of intoxicating liquors, etc., are prohibited unless each package containing the same "be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." Under the provisions of this section of the Penal Code a common carrier of interstate commerce is therefore apprised, when intoxicating liquor is received by it for shipment, of that fact, and, since the passage of the Webb law, before it delivers such liquor to the consignee in this state it should inform itself as to the purpose of the consignee with reference to the liquor. If it has liquor in its possession in this state for delivery to a person who intends to use it in violation of the law, or actually delivers it in this state to such person, then, presumptively, it has itself been guilty of a violation of the law.

"When an act denounced by the law is proved to have been committed, in the absence of countervailing evidence, the criminal intent is inferred from the commission of the act."—*Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575; *Tinker v. State*, *supra*.

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(7) The bill in this case alleges that the defendant, Southern Express Company, has, in Morgan county, Ala., depots, warehouses, or storage places where goods are stored or kept from the time they are received in Morgan county until they are delivered to their consignees in said county; that "prohibited liquors are received at said warehouses or storage places in large quantities and at frequent intervals to be delivered to individuals for illegal purposes, and that it is received by defendant for distribution or delivery, contrary to the laws of the state of Alabama, and that it is maintaining a common nuisance or liquor nuisance in violation of law." The bill therefore plainly charges a violation by the defendant of the law, and shows a situation which authorizes injunctive relief.—Gen. & Local Acts, Sp. Sess., 1907, pp. 71, 72, 73. The words, "prohibited liquors," used in the above quotation mean intoxicating liquors which, under the law, the defendant has not the legal right to have in its possession, and if it be true that the defendant, as charged in the bill, is in the habit of receiving and storing in its warehouses and storage places intoxicating liquors for the purpose of delivering them to consignees for illegal uses, then, under the terms of the Webb law, the defendant cannot claim protection against such illegal acts as a carrier of interstate commerce.

The court below committed no error in overruling the defendant's demurrer to the bill, and, under the facts stated in the bill, he had authority to grant the preliminary writ of injunction.

(8) In our opinion, however the court should have granted the defendant's motion to dissolve the preliminary writ of injunction. If, in good faith, and after proper investigation, a common carrier of interstate commerce delivers liquors to a consignee without any

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knowledge on its part that such liquors are intended by the consignee for illegal use, then such common carrier cannot, we think, be held to have violated any law of this state. The defendant's answer is sworn to, and while, in its answer, and as a part of its defense, it pleads the unconstitutionality of the Webb bill, in its answer it expressly negatives the charges in the bill of complaint that it is, in any way, acting in violation of any of the laws of this state. The answer is sworn to, and, "to justify a departure from the rule that an injunction should be dissolved on a sworn answer denying the averments of the bill, it must be apparent that irreparable mischief will follow, or some circumstance peculiar in its character must exist to justify a departure from it."—*Satterfield v. John*, 53 Ala. 127; *Johnson, et al. v. Howze, et al.*, 154 Ala. 496, 45 South. 653; *Long v. Shepherd*, 159 Ala. 595, 48 South. 675; *Weeks v. Bynum*, 158 Ala. 231, 48 South. 489.

(9) The above being our conclusions, the decree of the court below refusing to dissolve the preliminary injunction is hereby reversed, and a decree is here rendered dissolving said injunction, and the cause is remanded for further proceedings in the court below.

Reversed, rendered, and remanded. All the Justices concur.

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The State v. Alabama Fuel & Iron Co.

Assessment of Back Taxes.

(Decided July 25, 1914. 66 South. 169.)

1. *Taxation; Statutes; Classification; Money and Taxes.*—The Revenue Law providing for a tax for recording mortgages, deeds of trust, or written contracts of conditional sale, and providing that no ad valorem tax shall be collected on any such instrument, or the debts thereby secured, after such recording tax has been paid, but also levying an ad valorem tax on all moneys lent solvent credits, or credits of value, except such as are secured by mortgage, deed of trust, or written conditional contract of sale on which a recording tax has been paid, is not violative of section 211, Constitution 1901; the legislature having full power to classify for taxation moneys and credits secured by written instruments and other solvent credits not so secured.

2. *Same.*—The constitutional limitation requiring property to be assessed in proportion to value is designed to secure uniformity and equality of enforcement of the ad valorem system of taxation, and to prohibit arbitrary and capricious modes without reference to value, but it does not require that all property be taxed, nor prohibit exemption from taxation or such classifications of property as are not purely arbitrary, capricious or without semblance of reason.

3. *Same.*—A legislative classification of property for taxation will not be set aside by the court unless it is not only oppressive in its operation, but its inequality is so glaring that it can be judicially declared to be founded on arbitrary and capricious principles, without semblance of reason.

(Anderson, C. J., dissenting.)

APPEAL from Birmingham City Court.

Heard before HON. CHARLES W. FERGUSON, H. A. SHARPE, JOHN H. MILLER, and JOHN C. PUGH.

Action by the State of Alabama against the Alabama Fuel & Iron Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is an appeal by the state of Alabama from a judgment of the city court of Birmingham dismissing an assessment levied against the defendant for escaped taxes for the tax year beginning October 1, 1913. The proceedings were instituted by the tax commissioner of

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Jefferson county, Ala., who reported an assessment of escaped taxes to the board of revenue of Jefferson county, Ala., against the Alabama Fuel & Iron Company, upon the latter's solvent credits owned on October 1, 1913, and valued at \$45,000.

The proceedings were instituted under section 2260 and section 2151 of the Code of 1907. The case was heard, by consent, by the board of revenue, and the assessment confirmed. The defendant appealed to the city court of Birmingham, and in that court the state filed a statement or declaration setting up the proceedings before the tax commissioner and board of revenue, and asserting that the assessment was correct. The defendant demurred to the declaration or statement filed by the state, on the ground that solvent credits are not subject to assessment under the present laws of the state, upon the theory that paragraph "I" of subdivision 7 of section 2082 of the Code of 1907 is unconstitutional and void, upon the authority of *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947.

Paragraph "I" of subdivision 7 of section 2082 of the Code of 1907, and above referred to, is as follows: "All money lent, solvent credits, or credits of value, except such as are secured by mortgage, deed of trust, or written contract of conditional sale, upon which a tax imposed by law has been paid."

No other point or question of procedure, jurisdiction, or description, was presented by the demurrer, which was sustained by the city court. The state of Alabama declined to amend, and judgment was rendered for the defendant. From that judgment the state appeals, and assigns as error the judgment of the court below, sustaining the demurrer to the declaration.

The amount of the tax involved, based upon an assessment of \$45,000, and estimated on the basis of \$2.35,

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that being the combined state, county, and municipal rate, exceeds \$1,000. The appeal is, accordingly, returnable to the Supreme Court.

FORNEY JOHNSON, for the State. The power of the Legislature over all matters is plenary and unlimited, except as expressly restricted by the state and federal Constitutions. This applies to every method of taxation, whether upon an ad valorem or other revenue basis, or upon privileges or occupations.—*Hare v. Kennerly*, 83 Ala. 608, 3 South. 683; *State v. Street*, 117 Ala. 203, 23 South. 807; *W. U. Telegraph Co. v. State Board*, 80 Ala. 273, 60 Am. Rep. 99; *M. & S. H. R. R. Co. v. Kennerly*, 74 Ala. 566; *Moog v. Randolph*, 77 Ala. 597; *State v. Skeggs*, 154 Ala. 249, 46 South. 268; *Swann & Billups v. Kidd*, 79 Ala. 431; *Auditor v. Jackson County*, 65 Ala. 142; *State v. Birmingham Southern R. R. Co.*, 62 South. 77; *Capital City Water Co. v. Board of Revenue*, 117 Ala. 303, 23 South. 970; *Mefford v. Sheffield*, 148 Ala. 543, 41 South. 970; *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499; *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *W. W. Cargill v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; *Cook v. Marshall Co.*, 196 U. S. 268, 25 Sup. Ct. 233, 49 L. Ed. 473; *Armour Pkg. Co. v. Lavy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688.

The provisions of the Alabama Constitution do not require equality or uniformity, nor that taxes should be levied either in proportion to value or at the same rate; the exception being that property declared to be the subject for annual ad valorem taxes must be assessed in proportion to value.—*Hooper v. State*, 141 Ala. 111, 37 South. 662; *W. U. Telegraph Co. v. Board*, 80 Ala. 273,

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60 Am. Rep. 99; *Proenix, etc., Co. v. Montgomery*, 117 Ala. 646; 23 South. 843, 42 L. R. A. 468; *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240; *Moog v. Randolph*, 77 Ala. 597; *Common Council of Detroit v. Rentz*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; *Ala. Gold Life Ins. Co. v. Lott*, 54 Ala. 499, 507; 37 Cyc. 728; *State v. Trav. Ins. Co.*, 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481; *State v. Birmingham So. R. R. Co.*, 62 South. 77.

Neither section 211, Constitution of Alabama, nor the provisions of the fourteenth amendment, or the "pursuit of happiness" clause of the state Constitution, requires equality of taxation. On the contrary, the courts declare that exact equality is unattainable and undesirable, and, further, that horizontal levies would be oppressive.—*Mich. Cent. R. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744; *State of N. Y. ex rel. Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Hooper v. State*, 141 Ala. 111, 37 South. 662; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852; *Common Council of Detroit v. Rentz*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *Moog v. Randolph*, 77 Ala. 597.

The Legislature has the power to exempt any class or item of property from taxation, and to declare what property shall be the subject of ad valorem or annual property taxes, and, as distinguished from ad valorem taxes, to provide that any class of property or thing of value shall be subjected to a revenue tax levied upon a flat basis, or upon any rate which may be determined by

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the Legislature; section 211 applying only to ad valorem or property taxes, and not to special or registration or license taxes, even when levied for revenue.—37 Cyc. 735, 736; *Bidwell v. Coleman*, 11 Minn. 78 (Gil. 45); *Daughdrill v. Ala. Life Ins. Co.*, 31 Ala. 91; *State v. Birmingham Southern R. R. Co.*, 62 South. 77; *W. U. Telegraph Co. v. Board*, 80 Ala. 273; 60 Am. Rep. 99; *Phoenix, etc., Co. v. Montgomery*, 117 Ala. 631, 23 South. 783, 42 L. R. A. 468; *Clerk v. Port of Mobile*, 67 Ala. 217; *City Council of Montgomery, Ex parte*, 64 Ala. 464; *Hooper v. State*, 141 Ala. 111, 37 South. 662; *State Bank v. Board of Revenue*, 91 Ala. 223, 8 South. 852; *N. Y. ex rel. Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; *Mich. Cent. R. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744; *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786; *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323; *W. W. Cargill v. Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; *Cook v. Marshall Co.*, 196 U. S. 268, 25 Sup. Ct. 233, 49 L. Ed. 473; *Armour Pkg. Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688; *Home Life Ins. Co. v. N. Y.*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; *Wisconsin Cent. Ry. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833; *Chicago & N. W. v. State*, 128 Wis. 553, 108 N. W. 561; *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 34 Sup. Ct. 31, 58 L. Ed. —; *Kidd v. State*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *Moog v. Randolph*, 77 Ala. 597; *Mobile v. Stonewall Ins. Co.*, 53 Ala. 570.

The power to classify is necessary to avoid oppressive results, and is subject only to the limitations imposed by the state and federal Constitutions. These limitations prohibit only those classifications which can be supported on no rational hypothesis.—*W. W. Cargill*

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v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; *Cook v. Marshall County*, 196 U. S. 268, 25 Sup. Ct. 233, 49 L. Ed. 473; *Armour Pkg. Co. v. Lacy*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451; *Am. Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688; *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Mutual Benefit, etc., v. Martin County*, 104 Minn. 179, 116 N. W. 572; *Hooper v. State*, 141 Ala. 111, 37 South. 662; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852; *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 34 Sup. Ct. 31, 58 L. Ed. —; *Kenamer v. State*, 150 Ala. 74, 43 South. 482; *Griffith v. Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529; *Moog v. Randolph*, 77 Ala. 597; *Pocahontas Consol. Collieries Co. v. Commonwealth*, 113 Va. 108, 73 S. E. 446; *W. U. Telegraph Co. v. Board*, 80 Ala. 273; 60 Am. Rep. 99; *Mefford v. Sheffield*, 148 Ala. 539, 41 South. 970; *Ala. Con. v. Herzberg*, 177 Ala. 248, 59 South. 305; 37 Cyc. 746; *Mark v. D. C.*, 37 App. D. C. 563, 37 L. R. A. (N. S.) 440; *Farmers' & Mechanics' Savings Bank v. Minnesota*, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. —; *Mobile v. Dargan*, 45 Ala. 310.

A classification will be sustained, not only when based on an inherent natural distinction, but where it is expedient for the state to make distinctions, based on considerations of public policy, or expediency, or adaptability to the method or object involved.—*Mutual Benefit, etc., Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572; *State ex rel. v. Fitzgerald*, 117 Minn. 195, 134 N. W. 728; *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Mich. Cent. R. Co. v. Powers*, 201 U. S. 245, 293, 26 Sup. Ct. 459, 50 L. Ed. 744; 761; *Otis v. Parker*, 187 U. S.

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606, 23 Sup. Ct. 168, 47 L. Ed. 323; *N. Y. v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; *Nicol v. Ames*, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786; *Union Trust Co. v. Detroit*, 170 Mich. 692, 137 N. W. 122; *Hooper v. State*, 141 Ala. 111, 37 South. 662; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852; *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 34 Sup. Ct. 31, 31 §7 L. Ed. —; *Commonwealth v. Delaware Division Canal Co.*, 123 Pa. 594, 16 Atl. 584, 2 L. R. A. 798.

The right to tax all classes of solvent credits and all species of moneyed capital, with or without the allowance of a deduction for indebtedness, has been universally sustained.—*Hooper v. State*, 141 Ala. 111, 37 South. 662; *Jeff. Co. Sav. Bk. v. Hewitt*, 112 Ala. 546, 553, 20 South. 926; *Ala. Gold L. Ins. Co. v. Lott*, 54 Ala. 499; *Farmers' & Mechanics' Sav. Bk. v. State*, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. —; 37 Cyc. 783; *Kentucky & Louisville Mut. Ins. Co. v. Commonwealth*, 153 Ky. 824, 156 S. W. 897, 45 L. R. A. (N. S.) 597; *Detroit v. Lewis*, 109 Mich. 155; 66 N. W. 958, 32 L. R. A. 439; *Kingsley v. Merrill*, 122 Wis. 185, 99 N. W. 1044, 67 L. R. A. 204, 2 Ann. Cas. 748; *Standard Marine Ins. Co. v. Board of Assessors*, 123 La. 717, 49 South. 483, 29 L. R. A. (N. S.) 59; *Mutual Benefit Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 573; *Moog v. Randolph*, 77 Ala. 597; 606; *Sayre v. Pollard*, 77 Ala. 608; *Boyd v. Selma*, 96 Ala. 144, 148, 11 South. 393, 16 L. R. A. 729.

The right to tax mortgages, either upon an ad valorem or other revenue basis, or by a tax upon the privilege of registration, has been uniformly sustained.—*State ex rel. Trust Co. v. Still*, 62 South. 534; *Augusta Bk. v. Augusta*, 36 Me. 255; *Ala. Gold Life Ins. Co. v. Lott*, 54 Ala. 499; *Appeal Tax Court v. Rice*, 50 Md. 302; *Gold-*

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gart v. People, 106 Ill. 25; *People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Union Trust Co. v. Detroit*, 170 Mich. 692, 137 N. W. 122; *Mutual Benefit Ins. Co. v. Martin*, 104 Minn. 179, 116 N. W. 572; *State v. Fitzgerald*, 117 Minn. 192, 134 N. W. 728; *State v. Farmers' Bank*, 114 Minn. 95, 130 N. W. 445; *State v. Sellers & Orum Co.*, 151 Ala. 557, 44 South. 548; *Jeff. Co. Sav. Bank v. Hewitt*, 112 Ala. 546, 20 South. 926; *Farmers' & Mechanics' Sav. Bk. v. Minnesota*, 232 U. S. 34 Sup. Ct. 354, 58 L. Ed. —; *Savings & Loan Society v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. E. 803; 37 Cyc. 786; 37 Cyc. 756; *Saville v. Railway Co.*, 114 Va. 444, 76 S. E. 954; *People ex rel. Cooper Union v. Gass*, 190 N. Y. 323, 83 N. E. 64, 123 Am. St. Rep. 549, 13 Ann. Cas. 678; *People v. Trust Co. of America*, 208 N. Y. 463, 102 N. E. 578; *Union Trust Co. v. Common Council*, 170 Mich. 692, 137 N. W. 122; *Economy Power Co. v. Daskam*, 174 Mich. 402, 140 N. W. 466; 35 Cyc. 787. The taxation of credits secured by recorded mortgages, as distinguished from credits secured by unrecorded instruments, and as distinguished from unsecured credits, rests upon a rational basis, and is within the legislative power, although the sole tax levied is a tax upon the privilege of registration.—*People v. Ronner*, 185 N. Y. 285, 77 N. E. 1061; *Mutual Benefit Life Ins. Co. v. Martin County*, 104 Minn. 179, 116 N. W. 572; *State v. Fitzgerald*, 117 Minn. 192, 134 N. W. 728; *Union Trust Co. v. Detroit*, 170 Mich. 692; 137 N. W. 122; *State v. Sellers & Orum Co.*, 151 Ala. 557, 44 South. 548; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 517, 27 Sup. Ct. 571, 51 L. Ed. 901, 909; 37 Cyc. 787 (cited cases note 49); *People v. Gass*, 206 N. Y. 609, 100 N. E. 404; *Economy Power Co. v. Daskam*, 174 Mich. 402, 140 N. W. 466; *People v. Trust Company*, 208 N. Y. 463, 102 N. E. 578; *Pocahontas, etc., Co. v. Commonwealth*, 113 Va.

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108, 73 S. E. 446; *Saville v. Railroad Co.*, 114 Va. 444; 76 S. E. 954; *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 34 Sup. Ct. 31, 58 L. Ed. —; *Berea College v. Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; *State ex rel. Cont. Tr. Co. v. Still*, 62 South. 534; *Hepburn v. School Directors*, 23 Wall. 480, 23 L. Ed. 112; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, 900; *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892; *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714; *Chicago & N. W. Ry. Co. v. State*, 128 Wis. 553, 108 N. W. 557; *Firemen's Ins. Co. v. Com.*, 137 Mass. 80; *State v. Runyon*, 41 N. J. Law, 98; *Common Council v. Board, etc.*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *State, et al. v. Darcy, et al.*, 51 N. J. Law, 140, 145, 16 Atl. 160, 2 L. R. A. 350; *People v. Smith*, 88 N. Y. 576, 585; *Savings & Loan Society v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803; 1 Cooley on Taxation (3d Ed.), 272, 273; *Kidd v. Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *Common Council of Detroit v. Board*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *Kennamer Case*, 150 Ala. 74, 43 South. 482; *W. U. Telegraph Co. v. State*, 80 Ala. 278, 60 Am. Rep. 99; *Jeff. Co. Sav. Bank v. Hewitt*, 112 Ala. 546, 20 South. 926; *Orr. v. Sutton*, 119 Minn. 193, 137 N. W. 973, 42 L. R. A. (N. S.) 146; *State ex rel. Winona Motor Co. v. Minn. Tax Com.*, 117 Minn. 159, 134 N. W. 643; *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408; *State v. Parr*, 109 Minn. 147, 123 N. W. 408, 134 Am. St. Rep. 759; *Mechanics' Bank v. Tax Com.*, 156 App. Div. 343, 141 N. Y. Supp. 473; *Id.*, 209 N. Y. 526, 102 N. E. 1106; *Title Guarantee, etc., Co. v. Frifenhagen*, 156 App. Div. 854, 141 N. Y. Supp. 1044; *Id.*, 209 N. Y. 569, 103 N. E. 1131; *Staples v. East St. Paul State Bank*, 122 Minn. 419, 142 N. W.

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721; *First State Bank v. Hayden*, 121 Minn. 45, 140 N. W. 134; *Lake Street Bank v. Ekstrand*, 112 Minn. 412, 128 N. W. 455; *Mason v. Fichner*, 120 Minn. 185, 139 N. W. 485; *No. Ass. Co. v. Detroit*, 176 Mich. 80, 141 N. W. 909; *Bowen v. Moeller*, 171 Mich. 548, 137 N. W. 245; *Economy Power Co. v. Daskam*, 174 Mich. 402, 140 N. W. 466.

The sole question for decision in *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947, was whether the general revenue act of 1903, by repealing the express provision for the taxation of solvent credits, had the effect of exempting solvent credits from ad valorem taxes, and the conclusion of the court in that case cannot be construed against the constitutionality of the present acts levying a tax on solvent creditors.—*Hooper v. State*, 141 Ala. 111, 37 South. 662; *State v. Sellers & Orum*, 151 Ala. 557, 44 South. 548; *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257; *Southern Ry. v. St. Clair County*, 124 Ala. 504, 27 South. 23; *Maguire v. Board of Revenue*, 71 Ala. 401.

The readoption of an act, immediately following its construction by the courts, evinces a clear intention on part of the Legislature that effect shall be given to the laws; and the legislative purpose should not be annulled unless there is some constitutional inhibition which clearly and decisively forbids the provision.—*State v. Birmingham Southern R. Co.*, 62 South. 77, 82; *State ex rel. Meyer v. Greene*, 154 Ala. 249, 46 South. 268; *City of Ensley v. Simpson*, 166 Ala. 366, 52 South. 61; *Moog v. Randolph*, 77 Ala. 597.

Even if a classification were declared unconstitutional which taxes all credits on an ad valorem basis, and exempts credits secured by recorded mortgages from ad valorem taxation, the result would be that the exemption would fail, rather than the system from which an

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stitutionally excepted.—*State Bank v.*
 91 Ala. 217, 8 South. 852; *Mefford v.*
 48 Ala. 539, 41 South. 970; *State v.*
 203, 23 South. 807; *State v. Stonewall*
 Ala. 335, 7 South. 753; *State v. Kidd*, 125
 , 28 South. 480; *Moog v. Randolph*, 77 Ala. 597;
 s *Appeal*, 112 Pa. 337, 4 Atl. 149; *Montgomery v.*
Loyal Exchange Assessment Corporation, 5 Ala. App.
 318, 59 South. 508; *Maguire v. Board*, 71 Ala. 401; *Kidd*
v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed.
 669; *State v. Kidd*, 125 Ala. 413, 28 South. 480; *McIver*
v. Robinson, 53 Ala. 456.

PERCY, BENNERS & BURR, TILLMAN, BRADLEY & MOR-
 ROW, RICHARD V. EVANS, P. P. WALLROP, and E. C. HAR-
 RIS, for appellee. A. (a) "All taxes levied on property
 in this state shall be assessed in exact proportion to
 the value of such property. * * *" "The property
 of private corporations, associations, and individuals of
 this state shall forever be taxed at the same rate * *
 *"—Constitution of Alabama, sections 211 and 217.

1. The Legislature has the power to select the sub-
 jects of taxation and constitutionally classify them, but
 when a species of property is selected by the Legislature
 for taxation, all property of this species must be taxed
 uniformly and equally.—Constitution of Ala. §§ 211,
 217; *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947;
W. U. Telegraph Co. v. State, 80 Ala. 280, 60 Am. Rep.
 99; *State Bank v. Board of Revenue*, 91 Ala. 217, 8
 South. 852. See, also, authorities cited "(a) 6."

2. Subject to the Constitution the Legislature alone
 has the exclusive power to levy taxes. The courts have
 no power to levy taxes, and no taxes of any kind can be
 levied upon a citizen save in pursuance of a positive
 law, and in accordance with its provisions.—36 Cyc. p.

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724; *State v. State Board*, 73 Ala. 65; *Pollard v. Zuber*, 65 Ala. 628; *Auditor v. Jackson County*, 65 Ala. 142; *Maguire v. Road Coms.*, 71 Ala. 401; *Swann v. State*, 77 Ala. 548; *Neary v. Philadelphia*, 7 Houst. (Del.) 419, 9 Atl. 405.

3. Whenever the Legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and whenever a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate.—Constitution of Ala. §§ 211, 217; 37 Cyc. p. 736; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852; *W. U. Telegraph Co. v. State Board*, 80 Ala. 273, 60 Am. Rep. 99; *Moog v. Randolph*, 77 Ala. 597, 604; *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947. See, also, authorities cited in “(a) 6.”

4. Property selected for taxation is constitutionally classified only when the tax is levied equally and uniformly on all subjects of the same class and kind. See, also, authorities cited in “(a) 6.”

5. A classification of property for taxation, to be constitutional, must be based upon natural reasons, and not arbitrary or capricious ones—upon reasons which naturally inhere in the subject-matter so as to produce no distinction between members of the same class. See, also, authorities cited in “(a) 6.”

6. A statute which levies an ad valorem tax on a well-defined species of taxable property, but excepts therefrom those members of the species paying a nominal privilege tax, is an arbitrary classification, and in violation of the constitutional rule of uniformity, and void.—Constitution of Alabama, §§ 211, 217; *Cooley on Cons. Lim.* (5th Ed.) p. 638; 37 Cyc. pp. 736, 742, 746; *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947; *Hooper v. State*, 141 Ala. 111, 37 South. 662; *W. U. Telegraph*

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Co. v. State Board, 80 Ala. 273, 60 Am. Rep. 99; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852; *Mayo v. Stonewall Ins. Co.*, 53 Ala. 570; *Phoenix Ins. Co. v. Fire Dept. of Montgomery*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468; *Moog v. Randolph*, 77 Ala. 597; *Auditor v. Jackson*, 65 Ala. 142; *State v. Sellers*, 151 Ala. 557, 44 South. 548; *State v. Birmingham, So. Ry.*, 62 South. 77; *City of Montgomery v. Kelly*, 142 Ala. 552, 38 South. 67, 70 L. R. A. 209; *United New Jersey R. R. v. Parker*, 75 N. J. Law, 771, 69 Atl. 239; *In re Page*, 60 Kan. 842, 58 aPc. 478, 47 L. R. A. 68; *Wright v. So. Bell Telephone Co.*, 127 Ga. 227, 56 S. E. 116; *Clerk v. Maher*, 34 Mont. 391, 87 Pac. 272; *Hamilton v. Wilson*, 61 Kan. 511, 59 Pac. 1069, 48 L. R. A. 238; *State v. Canada Cattle Car Co.*, 85 Minn. 459, 89 N. W. 66; *Hawkeye Ins. Co. v. French*, 109 Iowa, 585, 80 N. W. 660; *Amer. Refrigerator Trans. Co. v. Thomas*, 28 Colo. 119, 63 Pac. 410; *George Schuster & Co. v. City of Louisville*, 124 Ky. 189, 89 S. W. 689; *Adams v. Miss. State Bank*, 75 Miss. 701, 23 South. 395; *Board of Coms. of Johnson County v. Johnson*, 173 Ind. 76, 89 N. E. 590; *In re. Keeney's Estate*, 194 N. Y. 281, 87 N. E. 428; *In re. Opinion of Justices*, 195 Mass. 607, 84 N. E. 499; *In re. Opinion of Justices*, 76 N. H. 588, 79 Atl. 31; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101.

7. Invidious exemptions or discriminations are violative of the equality right of the citizens, as well as the Constitution. See authorities cited supra in "(a) 6."

8. To single out a part of a well-defined species of property either for special favors, or for discrimination, is in violation of the Constitution. See authorities cited supra in "(a) 6."

9. Taxation is not uniform when it applies only to a portion of a well-defined species of property.—*Board*

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of *Coms. v. Johnston*, 173 Ind. 76, 89 N. E. 594. See authorities cited supra in "(a) 6."

(b) A solemn adjudication of a court of final jurisdiction upon a question of constitutional law involving the rights and financial interests of the entire citizenship of a state, and on which contracts have been made and credit extended, cannot be disturbed, unless for cogent reasons and upon the clearest convictions of error.—*Hart v. Floyd*, 54 Ala. 34; *Lombard v. Lombard*, 57 Miss. 171; *Snider v. Burks*, 84 Ala. 53, 4 South. 225; *Morton v. N. O. & S. Ry. Co.*, 79 Atl. 616.

1. The rule of stare decisis applies with peculiar force to decisions affecting taxation.—*Welch v. City of Boston*, 211 Mass. 178, 97 N. E. 893; *Commonwealth v. Nat'l Oil Co.*, 157 Pa. 516, 27 Atl. 374. See authorities supra in "(b)."

2. The rule of stare decisis applies with the greatest force to constitutional questions, because of their extreme importance.—*Bogard v. State*, (Tex. Cr. App.) 55 S. W. 494; *State v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *In re. City of Seattle*, 62 Wash. 218, 113 Pac. 762; *Amoskeag Mfg. Co. v. Goodale*, 62 N. H. 66; *Commonwealth v. Nat'l Oil Co.*, 157 Pa. 516, 27 Atl. 374; *Moore M. C. Co. v. Indianapolis N. C. & T. Ry. Co.*, 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816.

3. The rule of stare decisis obtains, although the court may be of the opinion that a former decision is founded upon an erroneous principle.—11 Cyc. p. 755.

B. (a) When a statute provides a comprehensive scheme of taxation and the parts are interdependent, the whole statute must fail if one provision is unconstitutional.—36 Cyc. p. 982; *Williams v. Park*, 72 N. H. 305, 56 Atl. 463, 64 L. R. A. 33; *Angell v. Cass Co.*, 11 N. D. 265, 91 N. W. 74; *Pollock v. F. L. & T. Co.*, 158

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U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; *Campbell v. Bryant*, 104 Va. 509, 52 S. E. 638.

(b) A proviso in a statute is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided. It is generally intended to restrain the enacting clause and to except something which would otherwise have been within it.—36 Cyc. p. 1161; *Carroll v. State*, 58 Ala. 396; *Ex parte Lusk*, 82 Ala. 519, 2 South. 140; *Pearce v. Bank of Mobile*, 33 Ala. 693.

(c) An exception in a statute differs from a proviso, in that the exception excepts something absolutely from the operation of the statute by express words in the enacting clause.—36 Cyc. pp. 11, 63, 64 (cases cited subdivision 66); *Campbell v. Jackman*, 140 Iowa, 475, 118 N. W. 755, 27 L. R. A. (N. S.) 288; *Rowell v. Janvrrin*, 151 N. Y. 60, 45 N. E. 398; *Pabst Brewing Co. v. Milwaukee*, 148 Wis. 582, 133 N. W. 1112.

(d) The re-enactment of a portion of an act in the language contained in the previous enactment, which language had previously been construed by the highest court of jurisdiction, operates as an adoption by the Legislature of the construction theretofore imposed by the court on the language re-enacted.

(e) Where a statute has been construed by the highest court of jurisdiction, and the construction placed upon the statute by such court has been generally acquiesced in by the executive officers of the state, the legal profession, and the people for many years, and millions of dollars have been invested on the faith of such construction by the court and the acquiescence of the executive officers, such construction becomes a rule of property.—36 Cyc. pp. 1139, 1140; *Musgrove v. Baltimore & Ohio*, 111 Md. 629, 75 Atl. 249; *State v. Harris*, 51 La.

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Ann. 1105, 26 South. 63; *State v. Nashville B. B. C.*, 127 Tenn. 292, 154 S. W. 1154, Ann. aCs. 1914B, 1243; *Van Veen v. Graham County*, 13 Ariz. 167, 108 Pac. 252; *United States v. A. G. S. R. R. Co.*, 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134; *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 262.

C. (a) The situs for taxation of solvent credits of a foreign corporation is at the domicile of the corporation, unless otherwise fixed by statute.—37 Cyc. 745, 801-806, 955; *Boyd v. Selma*, 96 Ala. 144, 11 South. 393, 16 L. R. A. 729; *State v. Kidd*, 125 Ala. 413, 28 South. 480; *Common Council of Detroit v. Board*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174; *Laura Wheeler v. Wm. Sohmer*, 233 U. S. 434, 34 Sup. Ct. 607; 58 L. Ed. —; *Walker v. Jack*, 88 Fed. 576, 31 C. C. A. 462; *Board of Councilmen v. Fidelity T. & S. Co.*, 111 Ky. 667, 64 S. W. 470; note, 62 Am. St. Rep. 430; *Life Ins. Co. v. New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853; *Liverpool Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762.

(b) The situs of a debt for the purpose of garnishment is at the domicile of the creditor.—*L. & N. R. R. Co. v. Dooley*, 78 Ala. 525; *A. G. S. R. R. Co. v. Chumley*, 92 Ala. 317, 9 South. 286; *L. & N. R. R. Co. v. Nash*, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; *L. & N. R. R. Co. v. Steiner & Lobman*, 128 Ala. 355, 30 South. 741; *Shuttleworth v. Marx*, 159 Ala. 418, 49 South. 83; *Planters' Chemical & Oil Co. v. Waller & Co.*, 160 Ala. 217, 49 South. 89, 135 Am. St. Rep. 93.

DE GRAFFENRIED, J.—We preface this opinion with the following excerpt from *Ex parte Bozeman*, 183 Ala. 91, 63 South. 201: “It is one of the cardinal rules governing the construction of statutes that, when the

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question as to whether a particular statute is or is not constitutional is reasonably in doubt, then the doubt should be resolved in favor of the constitutionality of the act.—*Lovejoy v. City of Montgomery*, 61 South. 597; *State ex rel. City of Mobile v. Board, etc., Commissioners*, 180 Ala. 489, 61 South. 368. The reason for the above rule is that the Legislature which passed the act is presumed to have sat in judgment, while the act was before it upon the question as to whether the Legislature possessed the constitutional power to make such a law. That body passed the act, the law presumes that the judgment of the Legislature was that the act was constitutional. This judgment of the Legislature, while not conclusive upon the courts, is entitled to, and under the above rule must receive, great weight at the hands of the courts. It is a solemn thing for a court to strike down a statute, and, when it does so, its reason therefor should be clear and strong and should lead to the irresistible conclusion that the act is invalid."

In the case of *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128, this court said: "The Legislature has a power which is so transcendent that it cannot be confined within any bounds, either for causes or persons, except such as are written in the organic law."

From the case of *State v. Board of Revenue and Road Commissioners*, 180 Ala. 489, 61 South. 368, we quote the following: "He who assails a statute on the ground that it is unconstitutional assumes the burden of vindicating his position beyond a reasonable doubt."

We refer to the above cases for the purpose of directing attention to the fact that this court has at all times refused to exercise itself about the policy or wisdom of a statute so long as it rests within the scope of legislative authority under the state and federal Constitu-

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tions, and that, when a statute is attacked upon constitutional grounds, all reasonable intendments will be resolved in favor of its validity.—*State ex rel. Meyer v. Greene*, 154 Ala. 254, 46 South. 268; *State v. Board of Revenue and Road Commissioners*, *supra*.

1. Section 211 of the Constitution of the state is as follows: "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

Section 217 of the Constitution provides that: "The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate," etc.

The present revenue law requires, as the prerequisite to the recordation in the probate office of a mortgage, deed of trust, or written contract of conditional sale, the prepayment of a privilege tax of 15 cents for each \$100 or fraction thereof of indebtedness secured by such mortgage, deed of trust, or written contract of conditional sale, and then declares that there shall be no ad valorem tax collected upon any such instrument, or the debt secured thereby, which shall have paid said privilege tax. The revenue bill, however, levies an ad valorem tax upon "all money lent, solvent credits, or credits of value except such as are secured by mortgage, deed of trust, or written contract of conditional sale, upon which a tax imposed by law has been paid."

It is contended by appellee, and the trial court so held, that the Legislature has not the authority, under the above-quoted constitutional provisions, to impose an ad valorem tax upon "all money lent, solvent credits,

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and credits of value," and lawfully exempt from such ad valorem tax "money lent, solvent credits, and credits of value," when secured by a recorded mortgage, deed of trust, or written contract of conditional sale. The proposition which appellee announces on this subject was succinctly stated in a dictum in *Barnes v. Moragne*, 145 Ala. 313, 41 South. 947, and which is in the following language: "It will not be doubted that the Legislature in the exercise of its authority or power to classify the subjects of taxation, may exempt 'all moneyed capital (that is, money lent, solvent credits, and other credits of value), from an ad valorem tax. These subjects may be well classified as one, but it would be an arbitrary and unjust classification to subject that species of solvent credits which are not secured by recorded instruments to a property tax and exempt those secured by recorded instruments. This, in our opinion, as said above, cannot be constitutionally done."

It is undoubtedly true that a debt secured by a mortgage is a credit. If it is owing by a solvent party or is fully secured, it is a solvent credit. Such a solvent credit is clearly within the general definition of "solvent credits," just as a horse is within the general definition of the word "animal." There is, however, a distinct line of cleavage between debts which are secured by mortgages and debts which are not so secured. There is also a distinct line of cleavage between debts which are secured by recorded mortgages and those which are not so secured. The law recognizes the difference between debts which are evidenced by negotiable instruments and those which are not; those which are evidenced by accounts stated and those which are not; those which are evidenced by a writing and those which rest in parol. The term "solvent credits" is broad enough to cover debts which are secured and those which are unsecured; debts which

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are negotiable and those which are non-negotiable; debts which are evidenced by writings and those which rest in parol. In other words, this term is broad enough to cover all solvent choses in action; and yet we know that embraced within this broad term are instruments of many distinct classes, and that there are many text-books written by eminent law writers which are devoted — exclusively to an elucidation of the laws which govern the distinct classes to which such instruments belong. There are volumes which are devoted exclusively to the discussion of the laws referable to negotiable instruments, volumes which are devoted to the discussion of the laws referable to mortgages, and volumes to the discussion of the laws pertaining to the general subject of — bills and notes. Debts secured by recorded mortgages, deeds of trust, and written contracts of conditional sale are necessarily in a class to themselves. The recordation of the instruments securing them places them in that class. Indeed, many of the decisions of courts of last resort and many of the statutes of our various states are devoted exclusively to declaring the rights, privileges and liabilities of the holders of this class of securities.

2. We have nothing to do, as we have already said, with the wisdom or policy of the Legislature in passing this law. Money is a bird of passage, and it usually finds a resting place at those points where it feels assured of safety. The unpopularity of the tax gatherer is proverbial, and the disposition to regard taxes as a burden is inherent. The efforts of the state to attract foreign capital find expression in many of our statutes, and it may be that the Legislature, for the purpose of inducing the holders of such capital to readily lend their money to such of our citizens as desire it and to induce those of our citizens who have been accustomed to adopt

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methods of escaping taxation to place their money in the hands of those who are willing to use it in their business, adopted this privilege tax with its accompanying exemption in subservience to a wise public policy. Indeed, the history of the state, since the adoption of the statute, has indicated that the reasons which actuated the Legislature in adopting the act were good and sufficient. To use the language of the Supreme Court of Minnesota:

“It is a notorious fact that the owners of securities in the form of bonds and notes have not been in the habit of paying their proportionate share of the taxes. This has been due in a measure to the ease with which the existence of such property can be concealed from the tax officials. But when the owner of a note takes a mortgage on real estate as security, and places it upon the public records, he exposes his ownership—at least, his ostensible ownership—and enables the assessor to reach him. The perfect security afforded by a good real estate mortgage makes it necessary for the owner to accept a low rate of interest, and the adequate net returns, after paying taxes in the ordinary way, often result in practical confiscation. The owner is thus tempted to seek some devious method for escaping taxation, in order that he may be on an equality with the owner of an unsecured note or bond, which rests undiscovered in a safety deposit vault. The mortgage is therefore taken in the name of a non-resident, or the money is sent to another state, and there loaned in the name of the true owner. Experience has shown that it is very difficult, if not impossible, to fairly and successfully tax this kind of property under the system ordinarily applied to personal property. This practical difficulty alone furnishes a basis for a classification, and justifies the Legislature in devising a special method for the taxation of

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the subjects of that class. To a certain extent the method provided in the statute under consideration recognizes the justice of the claim that taxing mortgages according to the ordinary methods results in inequality and injustice, and constitutes a constant temptation to fraud, whereby the honest and the innocent are made to suffer. By requiring a registration tax, every mortgage security pays a moderate tax, and this, in the judgment of the Legislature, is preferable to the certain uncertainties of the old system."—*Mutual, etc., Co. v. Martin, Co.*, 116 N. W. 572, 573, 574.

3. Recorded mortgages, deeds of trust, and written contracts evidencing conditional sales are exempt from taxation in the state. These instruments are required to pay for the privilege of being recorded, and they cannot be recorded without paying for the privilege. That the state has the right to exact this toll for the privilege is questioned by no one. That the state has the right to exempt all property of a particular kind from taxation is a proposition which is too firmly fixed in the jurisprudence of the state to now admit of question. What our Constitution requires is that: "Whenever the Legislature levies a tax on property, the rate must be in exact proportion to the value of such property; and that, if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation."—*State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852.

— "The purpose and scope of this constitutional limitation upon the taxing power has been frequently considered by this court, and the substance of our decisions is that it was designed to secure uniformity and equality by the enforcement of an ad valorem system of taxation and to prohibit arbitrary or capricious modes of taxation

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without regard to value.—*Moog v. Randolph*, 77 Ala. 597, 602; *W. U. Telegraph Co. v. State Board, etc.*, 80 Ala. 273, 275, 60 Am. Rep. 99; *Assessment Board v. A. & C. R. R. Co.*, 59 Ala. 551; *Mayor of Mobile v. Stonewall Insurance Co.*, 53 Ala. 570. This does not mean — that all property must be taxed.—*Moog v. Randolph, supra*; *State Bank v. Board of Revenue*, 91 Ala. 217, 223, 8 South. 852. Nor does it prohibit exemptions from — taxation or such classification of property as are not purely arbitrary, capricious, or without the semblance of reason.”—*State v. Birmingham Southern R. R. Co.*, 182 Ala. 475, 62 South 77.

“The paramount difficulty is as to when the courts — can properly interpose to declare a statute void, because of its taxing a particular class of property, upon a principle which seems to violate the rule of relative uniformity designed by the Constitution. ‘It is only when statutes are passed,’ says Bigelow, C. J., in *Commonwealth v. Savings Bank*, 5 Allen [Mass.] 436, ‘which — impose taxes on false and unjust principles, or operate to produce gross inequality, so that they cannot be deemed, in any just sense, proportional in their effect on those who are to bear the public charges, that courts can interpose and arrest the course of legislation by declaring such enactments void.’ This proposition, in my opinion, is correct, in a modified sense; but there can be no excuse for the interference of the courts, unless this inequality— whether manifest by a system of exemptions or classifications—is not only oppressive in — its operation, but is so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. In such a case, the system would cease to be taxation, and become governmental spoliation, thus trespassing on the boundary line of eminent domain, which is a right that

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cannot be exercised under the provisions of our Constitution, without first paying to the citizen a just compensation for his property taken by the state.—*New Orleans & Selma R. R. Co. v. Jones*, 68 Ala. 48. No law can be upheld which carries on its face the patent fact that its intention was confiscation under the guise of taxation.—*Cooley on Tax*. 128. Where the precise line of distinction exists, is often a question of great complexity and of difficult solution. Neither any fixed rule of reason nor the authorities furnish us any definite or clearly defined principle upon which to settle an accurate rule for all cases.—*S. & N. Railroad Co. v. Morris*, 65 Ala. 193; *State v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Knowlton v. Supervisors*, 9 Wis. 410; *Burroughs on Tax*. p. 32, § 34; *Wells v. City of Weston*, 22 Me. 385, 66 Am. Dec. 627; *State v. Fosdick*, 21 La. Ann. 434; *In Matter of Town of Flatbush*, 60 N. Y. 398; *State v. Ogden*, 10 La. Ann. 402. Subject to the above — limitation, I do not see how the courts can circumscribe the legislative power to select the proper subjects of taxation, and to classify them upon principles which to them seem just. There must, of necessity, be left a liberal scope for the free exercise of this presumably wise discretion. It is said by Judge Cooley, in his work on Constitutional Limitations: 'The constitutional requirement of equality and uniformity only extends to such subjects of taxation as the Legislature shall determine to be properly subject to the burden. The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department; but over all these objects the burden must be spread, or it will be unequal and unlawful as to such as are selected to make the payment.'—*Cooley, Const. Lim.* (5th Ed.) p. 638 (515)."—*Moog v. Randolph*, 77 Ala. 597, 603. 604.

It seems unnecessary for us to pursue this subject further. It seems plain that this statute is constitu- —

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tional. To use the language of the Supreme Court of the United States in *Farmers' & Mechanics' Savings Bank v. State of Minnesota*, 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. —: "In lieu of further discussion we refer to the oft-quoted language employed by Mr. Justice Bradley, speaking for the Supreme Court of the United States in *Bell's Gap R. Co. v. Penn.*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. E. 892, 895."

And, we cite, in support of the above conclusion, the following cases to which our attention has been called in briefs of counsel for appellant: *Mich. Cent. R. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744; *N. Y. ex rel. Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; *Louisa Kidd, as Ex'x, v. State of Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669.

4. While the Legislature, in the exercise of that reasonable latitude with respect to the classification of properties for taxation, and in the exercise of its reasonable powers of exempting properties from taxation—powers which all well-considered cases concede it to possess—had the undoubted right to require a privilege tax of all mortgages, deeds of trust, and written evidences of contracts of conditional sales, for their recordation, and to exempt such recorded instruments from an ad valorem tax, the imposition by the Legislature of an ad valorem tax upon all solvent credits not included in the above classification was not only not discriminatory, but it was, in fact, an effort on the part of the Legislature to meet the letter and the spirit of our Constitution, which intends, in so far as a healthy policy will permit, equality in taxation. Success in business is not the usual attainment of the average man. While human progress, the success of commercial and industrial enterprises, the moral and intellectual development of man—

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kind, and the constant trend of human effort towards the attainment of the high purposes of the future are largely dependent upon the activities and intelligence of the average man, history indicates that success in business will probably not come to him. The property of the average man is open to the eyes of him who gathers taxes for the state. If he is a farmer, his fortune consists in his lands, his animals, and his farming utensils. If he is a merchant, it consists in his home and in the contents of his modest store. It would seem, therefore, in justice to this, the great predominating class in the state, that those who are so highly favored as to possess solvent credits, not covered by some classification which, out of respect to a policy which the Legislature has deemed wise and just, entitles them to exemption from taxation, should be required to discover them to those who assess taxes for the state and to pay an ad valorem tax on them. The law is the exponent of a square deal, and, in requiring such solvent credits to be listed for taxation, the Legislature has simply responded to the demand which the doctrine of "the equality of burden" placed upon it. This act was a legislative effort to meet the letter and the spirit of the Constitution, which the appellee, in this proceeding, claims was violated.

5. There is one case in our reports (*Barnes v. Morgan*, 145 Ala. 313, 41 South. 947), and to which we have already referred, which contains expressions which are in direct conflict with the views above expressed.

In *Hooper v. State*, 141 Ala. 111, 37 South. 662, this court, speaking through Haralson, J., said: "By the act of March 3, 1903, 'To provide for the revenue of the state' (Acts 1903, p. 184), said last-named act amended said subdivision 7 of section 3911 by providing for what is termed 'privilege taxes' on mortgages, deeds of trust, or instruments in the nature of a mortgage, to

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secure the payment of any debt, and made no reference to taxation of solvent credits (Acts 1903, p. 227). Said subdivision was omitted and thereby repealed."

A careful examination of the opinion in *Hooper v. State, supra*, will show that this court, in that case expressly declared that for the tax year commencing on October 1, 1903, and ending on September 30, 1904, there was no law in this state authorizing the assessment of "all money lent, solvent credits, or credits of value, except as are secured by mortgage, deed of trust, or written contract of conditional sale, upon which a tax imposed by law has been paid." The assessment of the solvent credit which this court had under consideration in *Barnes v. Moragne, supra*, is shown by the summary of the facts set out by the reporter and by the original record on file in this court to have been made during a period when this state levied no ad valorem taxes upon solvent credits, and when it had no law authorizing such an assessment. The statement of the court in *Barnes v. Moragne, supra*, that the act which we now have under consideration was unconstitutional was a gratuity and is, of course, to be treated as mere dictum. The opinion in *Barnes v. Moragne, supra*, cannot be accepted as an authoritative declaration by this court upon the question in hand, and, while it may have been calculated to mislead, the decision does not fall within the protection of the doctrine of stare decisis. There was no necessity or occasion for a decision of the question (the question was not presented by the facts), and for that reason the opinion on the point under discussion was not a decision by this court, within the meaning of the doctrine of stare decisis.—*In re. Woodruff*, 96 Fed. 317, 321.

6. This opinion has been prepared after the determination of this case by the full court. The case has

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been painstakingly and carefully briefed by counsel on both sides. We have not undertaken in this opinion to review or to cite the numerous authorities to which counsel have referred us. To do so would unduly lengthen an opinion which has been arrived at after the most careful consideration by the whole court of the cases to which we have been referred and which shed light upon the questions which we have above discussed. These authorities will be perpetuated by the reporter, and a candid examination of them will, we think, demonstrate, beyond doubt, the integrity of our position.

This opinion is written simply for the purpose (without needless review or citation of authorities) of stating in a plain way the law, to the end that our officers and people may no longer be in doubt as to the obligations of the taxpayer to the state.

The rulings of the trial court were not in accordance with the above views, and the judgment of the trial court is therefore reversed, and the cause is remanded to the trial court for further proceedings in accordance with the views above expressed.

Reversed and remanded. All the Justices concur, except ANDERSON, C. J., who dissents.

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Assessment of Back Taxes.

(Decided July 25, 1914. 66 South. 178.)

Taxation; Foreign Corporation; Re-incorporation.—Where a foreign corporation having established a business in Alabama, was vested by an Act with all the rights, powers and privileges conferred by the general laws on domestic corporations, with full power to continue its business in Alabama as though it was a domestic corporation, the company thereby became a domestic corporation, for the purposes

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of taxation at least, and moneys and credits payable to it through its Alabama general office were subject to ad valorem taxation as money lent, solvent credits and credits of value arising from business done within this state.

(Anderson, C. J., dissenting.)

APPEAL from Birmingham City Court.

Heard before HON. CHARLES W. FERGUSON, H. A. SHARPE, JOHN H. MILLER, and JOHN C. PUGH.

Action by the State against the Tennessee Coal, Iron & Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The following is Act No. 196, Acts 1892-93, p. 454, conferring certain rights on the Tennessee Coal, Iron & Railroad Company, a foreign corporation within the state, referred to in the opinion:

“An act relating to the Tennessee Coal, Iron and Railroad Company, and to confer certain rights and powers on said company.

“Section 1. Be it enacted by the General Assembly of Alabama, that the Tennessee Coal, Iron and Railroad Company, a corporation doing business in this state, but created by and existing under the laws of the state of Tennessee, is hereby vested with, and after the passage of this act, shall have, possess and enjoy all of the rights, powers, privileges, franchises and immunities, which are now or hereafter may be conferred by the general laws of the state of Alabama, in corporations organized under the general laws of the state of Alabama, for mining, manufacturing or industrial purposes.

“Sec. 2. Be it further enacted, that the said Tennessee Coal, Iron and Railroad Company shall also have full power to lay off its land into lots, and parcels, and to lease, sell, donate and convey the same; to make sales, donations or loans of its lands or other property, money or effects to individuals, or corporations, to build and construct railroads, tramways, dummy lines or toll

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roads, and to operate the same, taking for such carriage or transportation reasonable fare or tolls, and using such motive power as may be deemed best on the property of said company, or over such lines; to build said roads or railroads in such directions as may be necessary or advisable in connecting separate parcels of the property of the company together, or in the conduct and management of the business of the company, or for such other purposes as it may find necessary.

"Sec. 3. Be it further enacted, that the said Tennessee Coal, Iron and Railroad Company shall have full power to build such furnaces, mills, factories, work shops, machine shops, foundries and all other industrial enterprises of all kinds, such as said company may deem for its interest, to invest the whole or any part of its funds or property in the capital stock or bonds of, and become a stockholder by subscription, either in cash or in property, real or personal, or by purchase of stock in any other corporation formed or to be formed, or in the bonds of such corporation, and to retain or dispose of such stock in whole or in part at pleasure, exercising while holding the same, all the rights and privileges and powers of stockholders in such corporation; to lease, construct and operate, or to assist persons or corporations in such manner as the said Tennessee Coal, Iron and Railroad Company may deem advisable in leasing, constructing, owning and operating furnaces, mills, railroads, factories, workshops, foundries and other industrial enterprises of any kind, whether herein enumerated or not, and at its pleasure to incorporate the same; to construct, rent, own and sell houses and other improvements, and to improve its lands in such manner as it may deem fit; to develop power by electricity, and utilize the same, to erect wires for the transmission of such power to distant points, and to furnish and sell the same to other parties.

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"Sec. 4. Be it further enacted, that the said Tennessee Coal, Iron and Railroad Company hereby is authorized and empowered to locate, construct and operate one or more railroads of such gauge and as many tracks as it may deem proper for its coal or iron lands or mines, ore beds, or coking ovens, coaling or coking grounds, manufactures, furnaces, or other places of business, which it now has, or may hereafter establish, for the operation of said works and mines, and for the transportation of material from any one of such points to any other, and for any other uses or purposes, in connection therewith; and said company is also hereby authorized and empowered to locate, construct and operate one or more railroads from its mines, furnaces, or coke ovens, to any point or points on any stream or any navigable waters, and to such landings, wharfs or depots, as such company may choose to establish along or at the terminus of any such line or lines of railroad, and to engage in the carriage of persons, or property as a common carrier, and to charge rates of freight or tolls for the same, over said line or lines of railroads, and to contract for the use of and to lease and acquire by purchase any line or lines of railroad, that are now or may hereafter be constructed in this state, and to connect the same with its other line or lines of railroad, or to operate them separately, as it may see fit; to purchase, own, charter or hire tugs, barges, steamboats, and other kind of watercrafts, as well as own, use, lease and occupy all such wharves and landings as it may deem necessary and proper in the transportation of property of any kind, including the products of its mines, or manufactured products, on any of the navigable waters of the state; to own and operate barge lines or steamboat lines for the transportation of its products, on the navigable waters of this state, or on the Gulf of Mexico or adjoining wa-

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ters; and to use the same in the transportation of persons or of property, for the public, charging therefor reasonable rates of freight.

“Sec. 5. Be it further enacted, that the said Tennessee Coal, Iron and Railroad Company shall have the right to condemn such property rights of way or water courses, as may be necessary or advisable to enable said company to successfully construct, erect, and operate such railroads, water works, tramways and electric lights works; said condemnation to be made in accordance with the methods of procedure provided by the *ad quod damnum* laws of the state of Alabama.

“Sec. 6. Be it further enacted, that the said Tennessee Coal, Iron and Railroad Company is authorized and empowered to unite and consolidate itself with any other corporation or corporations created by this or any other state, by a two-thirds vote of its stockholders, and form one general company, under such name and style as may be agreed upon and to issue and apportion the stock of such consolidated corporation, as may be agreed upon by said two-thirds of the stockholders in each of said corporations; and to take up, if deemed proper and best, the individual stock of each company, and to replace it with stock of the general company, in such manner and amounts as may be agreed upon by said two-thirds of the stockholders: Provided, that such consolidated company shall keep an office in the state of Alabama, and thereupon said general company shall be invested with all the powers and franchises heretofore belonging to each, and all of said corporations so uniting or consolidating: Provided further, that the rights and remedies of creditors shall not be affected by such consolidation.

“Sec. 7. Be it further enacted, that nothing herein contained, shall be construed as in any way limiting or

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interfering with the rights, privileges and immunities which the said Tennessee Coal, Iron and Railroad Company, may now possess and enjoy, under the charter granted to it by the state of Tennessee.

"Approved February 10, 1893."

FORNEY JOHNSTON, for the State. For brief in this case see brief and authorities cited in *State v. Ala. Fuel & I. Co., infra*, 66 South. 169.

PERCY, BENNERS & BURR, TILLMAN, BRADLEY & MORROW, RICHARD B. EVANS, P. P. WALDROP, and E. C. HARRIS, for appellee. For brief in this case see brief and authorities cited in *State v. Ala. F. & I. Co., infra*, 66 South. 169.

DE GRAFFENRIED, J.—In the case of *State of Alabama v. Alabama Fuel & Iron Co., infra*, 66 South. 169, in which an opinion was handed down on this day, this court determined that the provision in our revenue bill, which provides for an ad valorem tax on "all money lent, solvent credits or credits of value, except such as are secured by mortgage, deed of trust or written contract of conditional sale, upon which a tax imposed by law has been paid," is violative of no provision of the state or federal Constitution and is therefore valid. The opinion in the above case must be read in connection with this opinion, in order that this opinion may be fully understood.

1. The record in this case discloses that the Tennessee Coal, Iron & Railroad Company is a corporation organized and existing under the laws of the state of Tennessee; that its legal domicile is now and has always been in Grundy county, Tenn., but that on and for many years prior to and continuously since the 1st day of October, 1913, defendant has maintained general offices

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in Jefferson county, Ala.; and that said corporation, having qualified under the laws of the state of Alabama to conduct its business, that of mining and manufacturing within the state of Alabama, is and has been conducting a general mining and manufacturing business within the state. The record further discloses that the particular assessment which has brought about this litigation was an ad valorem assessment upon "money lent, solvent credits, and credits of value arising from the business done in the state of Alabama (excluding such as are secured or evidenced by mortgage, deed of trust, or written contract of conditional sale upon which a tax imposed by law has been paid), due from persons or corporations domiciled and doing business in Alabama, and payable at the offices of said Tennessee Coal, Iron & Railroad Company, in Jefferson county, Ala., owned by said Tennessee Coal, Iron & Railroad Company, October 1, 1913."

In addition to the above we call attention to the act of the Legislature which is entitled "An act relating to the Tennessee Coal, Iron and Railroad Company and to confer certain rights and powers on said company," which was approved on February 10, 1893. See Acts of Alabama 1892-93, p. 454. The many and broad powers and privileges which are conferred upon this corporation by the above act illumine the question which we have in hand, and, as the act should be read in connection with this opinion, the Reporter will set it out in his summary of the facts. While in this act there is a provision that "nothing herein contained, shall be construed as in any way limiting or interfering with the rights, privileges, and immunities which the said Tennessee Coal, Iron and Railroad Company, may now possess and enjoy, under the charter granted to it by the state of Tennessee," the act, when read in connection with the assessment and the

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complaint which is founded upon the assessment, clearly indicates that this corporation, in so far as its business in Alabama is concerned, has established a permanent habitation in this state and that it is now, by virtue of that habitation and the act which was placed upon our books for its special benefit, enjoying rights and privileges in this state which pertain to none of our private citizens, and which but few of our own domestic corporations can, under our general laws, enjoy. The above act, when read in connection with the complaint and the assessment, clearly shows that while, by virtue of its birth in the state of Tennessee, this corporation may owe allegiance to the state of Tennessee, it is in reality a denizen of Alabama, and, in so far as the property which is involved in this assessment is concerned, must rely, and is, under our law, entitled to rely, for protection, upon the laws of this state. In modern times, particularly in our states, corporations are not unaccustomed to organize themselves under the laws of one state for the sole purpose of doing business in some other state. It not infrequently occurs that a company which is organized for the sole purpose of supplying some particular city with water or with electricity or with some other public necessity claims citizenship in some state distant from that in which it does its sole business simply because it organized itself into a corporation there. The actual business of such a corporation may be, and frequently is, confined exclusively to some locality in one state, while, pro forma, its citizenship is in some other state. In all such cases the law, when it comes to matters of taxation, must throw aside the draperies with which such a corporation is clothed, and ascertain the situs (the actual place) of its property, and then accord to the state, which in reality has the business of such a corporation within its care, that

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right of taxation which belongs to the state as a return for its actual protection.

It is unquestionably true that in a government like our own it would be desirable for some plan to be devised whereby double taxation would be rendered impossible, but no such plan has yet been devised. To use the language of Holmes, J., in *Louisa Kidd, Ex'x, v. State of Alabama*, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 240: "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far.—*Coe v. Errol*, 116 U. S. 517, 524, 6 Sup. Ct. 475, 29 L. Ed. 715, 718; *Knockton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; *Dyer v. Osborne*, 11 R. I. 321, 327, 23 Am. Rep. 460; *Cooley, Tax.* (2d Ed.) 221n. One aspect of the problem was touched in the case of *Blackstone v. Miller* (at the present term) 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439. The state of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then, for the purpose of its laws, the property is not taxed at all."

2. The Tennessee Coal, Iron & Railroad Company is in all human probability, in pursuance of the powers which are conferred upon it by the above act, one of the chief factors in promoting the development of the resources of that part of the state in which its activities are engaged. In its efforts to promote the interest of its stockholders it is probably largely adding to the material welfare of the state and increasing the prosperity and happiness, not only of its own employees, but also of those who must receive indirect benefits from the

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development of its properties. In harmony with the purposes for which it was admitted into the privileges which it now enjoys, it may have, and probaably has become, one of the large business interests which the laws of the state must be called upon to constantly protect.—*Tennessee Coal, Iron & R. R. Co. v. Hamilton*, 100 Ala. 252, 14 South. 167, 46 Am. St. Rep. 48. It has, however, taken up a home with our people. It has established general offices in our state, and we think it plain from this record that, in so far as its business in Alabama is concerned, that business is as distinct from its business in Tennessee (if it has business in that state) as if it were in fact a corporation entirely distinct from the Tennessee corporation. Necessarily, as the Tennessee Coal, Iron & Railroad Company has general offices in Alabama, and as this record and the above act clearly indicate the nature and, in some measure at least, the extent of its business, it must have one or more general agents in this state. The assessment in this case is upon solvent credits "due from persons or corporations domiciled and doing business in Alabama and payable at the offices of said Tennessee Coal, Iron & Railroad Company in Jefferson county, Ala., owned by said Tennessee Coal, Iron & Railroad Company, October 1, 1911."

Our statute providing for ad valorem taxes upon solvent credits not secured by mortgages, etc., which have been recorded and which have paid a privilege tax, is broad and sweeping in its terms. It is broad enough to cover, and does cover, all solvent credits which have their situs in this state. In our opinion the record in this case shows that the situs of the solvent credits made the subject of this assessment is the state of Alabama, and that they are liable to an ad valorem tax in this state. Presumptively, under the facts shown by this record, the solvent credits of appellee are in the hands

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of those who have charge of their general offices in Jefferson county.

"The situs of personal property, whether tangible or intangible, for the purposes of taxation, unless otherwise provided by statute, is at the place of residence of the owner; the only exception being where the property is employed in business, or is in the hands of an agent of the owner having an actual situs different from the domicile of the owner. It is not necessary, therefore, that the owner should reside within the state to render his personal property, situated within the state, liable to taxation."—1 *Desty on Taxation*, p. 322, § 67; *Cooley on Taxation*, p. 371; *Burroughs on Taxation*, § 50, p. 59; *Boyd v. Selma*, 96 Ala. 144, 11 South. 393, 16 L. R. A. 729.

While the legal residence of appellee may be in Tennessee, it has actually domiciled itself with us, and, on the face of the papers in this record, read in connection with the above act under which the appellee has been conducting operations in this state, we are of the opinion that the situs of the property sought, in this proceeding to be taxed, is the state of Alabama, and that this state has the right to impose an *ad valorem* tax upon the same.

The rulings of the trial court were not in accordance with the above views. The judgment of the trial court is therefore reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded. All the Justices concur, except ANDERSON, C. J., who dissents.

[Watters, et al. v. Lyons.]

Watters, et al. v. Lyons.*Election Contest.*

(Decided November 7, 1914. 66 South. 436.)

1. *Elections; Contests; Grounds.*—Acts 1911, p. 349, sections 18 and 25, considered, and it is held that a violation of either of such provisions by a candidate for the office of commissioner of a city was not ground for a contest to the benefit of the opponent of the commissioner elected.

2. *Pleading; Amendment; Right.*—An amendment which will not cure a fatal defect in a pleading will not be allowed; hence, a party seeking leave to amend must show that the proposed amendment will make such pleading good.

APPEAL from Mobile Law and Equity Court.

Heard before Hon. SAFFOLD BERNEY.

Election contest instituted by J. P. Watters and others, against Pat J. Lyons, to contest his election to the office of commissioner of the city of Mobile. Judgment for contestee and contestants appeal. Affirmed.

D. B. COBBS, for appellant. The appeal relates only to the ineligibility of Lyons, and this ineligibility arises through a violation of the statute, and of the Code. The rulings on ineligibility were not without injury to appellant as bribed votes were illegal, and should have been thrown out and not considered.—29 Kan. 282; 19 S. W. 407. The ineligibility alleged was sufficient to confer jurisdiction of the cause of action.—Subd. 2, § 455, and § 1467, Code 1907; *Finklea v. Farrish*, 160 Ala. 236. It is a matter of right to amend the defective statement.—*Robinson v. Darden*, 50 Ala. 72; *Mayhan v. Smitherman*, 71 Ala. 565; 32 Cyc. 372. The court erred in dismissing without opportunity for amending.—*Kingsbury v. Milner*, 69 Ala. 502.

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GREGORY L. & H. T. SMITH, for appellee. The motion to strike from the bill of exceptions everything that is recited to have transpired prior to ninety days before presentation should be granted.—§ 3019, Code 1907; *Turner v. Spragins*, 172 Ala. 98. The contest of an election is strictly statutory, and the statute must be strictly observed and construed.—*Pearson v. Alberson*, 160 Ala. 265; *Black v. Pate*, 130 Ala. 514. A contestant cannot amend his contest by averring jurisdictional facts which have been omitted, subsequent to the expiration of the time allowed for contesting.—Authorities supra. The right of contest on the ground of ineligibility is provided by subd. 2, § 455, Code 1907, and requires that the ineligibility shall exist at the time of such election, and the failure to aver this was fatal.—Authorities supra. The contestant was, therefore, without right to the amendment offered at the time it was offered.—Acts 1911, p. 348, §§ 18, 19 and 25. In any event, the contest could not have resulted to the benefit of contestants, and therefore, they are without right to complaint.—Acts 1911, p. 330, § 474, Code 1907.

MAYFIELD, J.—This appeal seeks to revise rulings of the trial court in dismissing an election contest in so far as it relates to the eligibility of the contestee, Lyons, to hold the office of commissioner for the city of Mobile.

There were two paragraphs of the statement of the grounds of contest which attempted to set up the ineligibility of the contestee. These paragraphs were 4 and 12, and were as follows: “(4) That said Pat J. Lyons was not eligible to the said office for which he was voted for at said election, and said declaration of election is illegal.”

“(12) That said Pat J. Lyons in said election violated section 25 of said act of Legislature of April 8, 1911,

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in that, being a candidate for commissioner at said election, he knowingly permitted and connived at certain of his political friends' and agents' hiring or paying or agreeing to pay others to solicit votes for him at or near the polls, and said Pat J. Lyons became and was a party, indirectly and directly, to such hiring, paying, or agreeing to pay for such soliciting, and for that, prior to said election day, said Pat. J. Lyons was a party to such hiring, paying or agreeing to pay, for such soliciting, and for that on said election day said Pat J. Lyons was a party to such hiring, paying, or agreeing to pay for such soliciting."

The trial court, on contestee's motion, dismissed the contest in so far as it related to these two grounds; and these two rulings are each assigned and insisted upon as error.

Contestants then orally moved the court to be allowed to amend each of these grounds of contest. The court overruled these motions, to which rulings the contestants excepted. Several days later the contestants renewed their motions to amend these grounds of contest, reducing their amendments to writing, and also moved to have contestee's motion to dismiss enrolled as a part of the record of the court. Each motion was denied, and contestants excepted.

It is made to appear, from an examination of this record, that no facts were alleged or offered to be alleged, which, if conceded to be true, would render the contestee ineligible to office at the time of such election, and within the meaning of subdivision 2 of section 455 of the Code, which is conceded to be the only authority which authorizes a contest on the ground of ineligibility.

It is true that the act of April 8, 1911 (page 330 et seq.), makes a great number of acts, as to conduct in the election, unlawful, and as a part of the penalty pro-

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vides that such offenses shall be grounds for removal of the commissioner from office, and shall disqualify him to hold office, and some of these offenses, it is provided in terms, shall render him ineligible to the office sought; but there is no provision in such statute, nor in any other known to us, which makes any of these wrongful acts grounds of contest of the election of the officer guilty thereof, on the charge of ineligibility at the time of the election. There are similar statutes to the one under consideration, viz., the one of March 31, 1911 (page 221, § 25), and likewise the act of April 6, 1911 (page 313, § 25), which provide that violations of the provisions of such sections, by a candidate, shall be grounds of contest if such candidate, so offending, is successful. These sections of other similar acts are very similar to, and one is almost identical with, the sections of the act of April 8, 1911 (page 330), the sections in question. The omission of this provision from the act in question is significant. The Legislature evidently thought the insertion of this provision in the other acts was necessary to authorize a contest of the election, in the event the candidate violating was successful; and the omission of such provision from the statute in question leads us to the conclusion that it was not intended by the Legislature that elections held under the provisions of the act in question could be contested on the ground that the candidate, on the day of the election, violated the provisions of the act, as was alleged or sought to be alleged in the statement or petition of contestants in the case.

The three statutes above referred to cannot be read, without seeing the striking similarity of each to the others; in fact, they are almost identical in most of their provisions. It clearly appears that two of them are practical copies, in most respects, of each other; there being changes only in certain particulars, and one of the

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few material changes is that the wrongful acts complained of in this case are made grounds of contest in the other two statutes, but are not made so in the one in question.

The act in question nowhere provides for a contest of the elections authorized therein, but it is conceded in this case that the contest must be had under section 455 et seq. and section 1168 of the Code. We feel sure that there are no Code provisions which authorize a contest on any facts stated, or offered to be stated, in paragraphs 4 and 12 of contestants' statement, which will authorize a contest of the election in question. This being true, it necessarily follows that no injury was done contestants in striking their contest in so far as it related to the ineligibility of the contestee, nor in declining to allow the proposed amendments to paragraphs 4 and 12. If these paragraphs had been amended as proposed by contestants, or if they had originally contained all the facts offered to be added by the amendment, they would still, considered jointly or severally, have stated no valid ground of contest; and the court could have granted no relief if the facts alleged had been proven.

It is conceded in brief of counsel that this appeal is to test the question as to whether or not violations of sections 18 and 25 of the act of April 8, 1911 (page 330 et seq.), could be made grounds of contest of an election held in virtue of such act. The record is evidently made for the purpose of presenting this question for our decision; and we feel no doubt in holding that violations of one or both of these sections are not made grounds for contest. While these sections and others of the act, provide that the candidate offending shall be disqualified, ineligible, and subject to removal, effect must be given to them in some other proceedings, such as quo war-

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ranto, impeachment, indictment, etc. The exact proceeding to be pursued in such case is not before us, and we do not now decide, in this regard, except to the extent of holding that the matters alleged or proposed to be alleged in sections 4 and 12 of the statement of contest in this case are not grounds for contest in this case.

It should be said, however, in this case, that the Code provisions, under which this proceeding was had, require that "a statement in writing, verified by affidavit, of the grounds of contest as provided," shall be filed in the office of the clerk. The original statement, so verified, was so filed, but the court, on contestee's motion, dismissed the contest, in so far as it related to the ineligibility of the contestee; and while offers to amend were made, and the offers denied, it does not appear that the amended statement proposed, nor the facts offered to be added to the original, were verified.

We do not now decide whether the proper practice was pursued in this case as to the motion to dismiss, nor whether the contestee should have been put to his demurrer, nor whether the contestants should have re-verified their statement after the addition of the proposed amendment; but we merely call attention to the statutes.

We decide this case on the theory that if the proper practice was or had been pursued, no ground of ineligibility was alleged or proposed to be alleged, which would have been ground for contest, and that it is therefore made conclusively to appear that no possible injury was done the contestants. It is also well to note that while a number of grounds of contest remained, and issue was taken on them, no attempt was made to prove any one of them.

It is also well to note that, when a party seeks leave to amend, the law requires him to show or apprise the

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trial court that the proposed amendment will make the pleading or process, proposed to be amended, good. The law will not do, or compel to be done, the foolish thing of making an amendment, when the amended pleading or process would be no better than the original, which was held bad.

The authorities relied upon by appellants are not contrary to what we have decided; in fact, we think they support the holding in this case. Such are the cases of *Wade v. Oates*, 112 Ala. 325, 20 South. 495; *Frost v. State ex rel.*, etc., 153 Ala. 654, 45 South. 203; *Black v. Pate*, 130 Ala. 514, 30 South. 434; *Pearson v. Alverson*, 160 Ala. 265, 49 South. 756; *Ex parte Shepherd*, 172 Ala. 205, 55 South. 627. In these cases it is held that contests of election are unauthorized, except by express statutes, and that any material departure therefrom is unauthorized. The last case cited, and the same on a subsequent appeal (*Shepherd v. Sartain*, 185 Ala. 439, 64 South. 57), contain a full discussion of the rules of law.

There being no sufficient proof offered, much less introduced, to support any one of the specified grounds of contest on which the trial was had, the court rendered the only judgment it could properly have rendered.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

[Howard v. Brannan.]

Howard v. Brannan.*Ejectment.*

(Decided November 7, 1914. 66 South. 433.)

1. *Boundaries; Section Line; Location.*—Where the sole issue in ejectment was the location of a boundary line between two government sections, such line, when located, was conclusive and fixed, notwithstanding the encroachment by the parties on either side of the line may have ripened into title by adverse possession, since such fact could not change the location of the section line, nor transfer the land so claimed from one section to the other.

2. *Same; Instructions.*—Where ejectment was brought to recover the south half of the southwest quarter of a certain section, and defendant filed a disclaimer and set up that the dispute arose over a disputed boundary line separating sections 17 and 18 in the township, and each party pleaded what he claimed to be the true boundary line, a charge that if the jury were satisfied that the owners of the land on both sides of the M. line had recognized it as the true line, and had held up to such line adversely for more than ten years up to the time defendant bought his land, the jury should find the issues for plaintiff, was beyond the issues and erroneous.

APPEAL from Mobile Circuit Court.

Heard before HON. SAMUEL B. BROWNE.

Ejectment by Thos. J. Brannan against E. I. Howard. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The following is charge 1 referred to in the opinion:

The court charges the jury that if they are reasonably satisfied by the evidence that the owners of the land on both sides of the Maples' line have recognized such line as the true line dividing section 17 from section 18, and have held and used up to such line for more than ten years continuously and adversely up to the time defendant bought his land, then you must find the issues for the plaintiff.

RICH & HAMILTON, for appellant. Section 2830, is not retroactive for to so construe it would render it un-

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constitutional.—*Ala. Co. v. Boykin*, 38 Ala. 510; *Sadler v. Langham*, 34 Ala. 311. The description of the land being definite as here, does not confer color outside of such description.—*Jeffries v. Jeffries*, 62 South. 797; *Walker v. Wyman*, 157 Ala. 485; *Wyman v. Walker*, 53 South. 403. An agreed location of a line is not binding short of the statute of limitations.—5 Cyc. 932. There can be no adverse possession without hostility to the whole world.—*Ashford v. Ashford*, 136 Ala. 631; *Dothard v. Denson*, 75 Ala. 482; *Stiff v. Cobb*, 126 Ala. 381. It is fundamental that there can be no adverse possession as against the government. It follows from these authorities that the charges requested by defendant should have been given, and a charge given for plaintiff was erroneous.

ERVIN & MCALEER, for appellee. The charge given for plaintiff was unquestionably correct.—*Taylor v. Fomby*, 116 Ala. 626. If parties recognize the line as being correct and hold to said line, each claiming adversely to said line for the requisite period, title is acquired to said line, even though the line be incorrect.—*Taylor v. Fomby*, *supra*; *Brown v. Cockrell*, 33 Ala. 43. These authorities are conclusive of the points in issue.

ANDERSON, C. J.—This was the statutory action of ejectment for the recovery of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 17, township 1 north, of range 3 west, in Mobile county.

The defendant filed a disclaimer, which meant that he did not claim any land sued for by the plaintiff, and set up, under the terms of section 3843 of the Code of 1907, that the dispute arose over a disputed boundary as to the line separating sections 17 and 18. The plaintiff then averred that the true boundary between said

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sections was as set out by him. The defendant took issue on this, and also averred that the true boundary line between sections 17 and 18 was as set out by him, and which differed from the line set up by the plaintiff.

Therefore the one and only issue was the location of the true line, as per the government survey, between sections 17 and 18, and not of some other line that may have been fixed by adverse possession or by the respective owners. When the true line was established between these sections by government survey, it was the only line separating the one from the other; and while the act of the parties, as to encroaching upon either side, may have ripened into title, yet it could not transfer land from one of said sections to the other. If the plaintiff claimed land beyond the line, it should have been set out as being a part of section 18; and, if the defendant claimed that he owned land beyond the proper line, he should not have disclaimed ownership or possession as to the land sued for by the plaintiff. In other words, the issue made up between the parties was not whether or not the plaintiff owned any land in section 18, or whether or not the defendant owned any of the land in section 17, as sued for by the plaintiff, but what was the true line between said sections. It may be true that neither party could be confined in ownership to the section line, if they had recognized another as the line and adversely claimed accordingly under a proper issue, but there can be but one true and correct line between the sections for the purpose of distinguishing the one from the other; and, if one encroached upon the other, the claimant might acquire title to the extent of his claim, but this could not operate to take land out of section 17 and put it in section 18.—*Wade v. Gilmer*, 186 Ala. 524, 64 South. 611. It is true the court held, in the case, *supra*, that the plaintiff, by taking issue upon the dis-

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claimer, also injected the issue of possession; but in this case there was no issue taken upon the disclaimer, and the minute entry is that issue was taken upon the issues filed February 14, 1913, and which issues so filed related only to the true boundary line between sections 17 and 18.

The charge given for the plaintiff, which we number 1, went beyond the issue made up by the parties, and should have been refused, and the trial court committed reversible error in giving said charge.

It is unnecessary to discuss the other assignments of error. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MCCLELLAN, MAYFIELD, and DE GRAFFENRIED, JJ., concur.

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Ejectment.

(Decided November 7, 1914. 66 South. 454.)

1. *Exceptions; Bill of; Variance; Documents.*—Where the clerk was directed to insert in the bill of exceptions a deed identified by the recital that plaintiff offered in evidence a deed from B and G conveying an undivided one-third interest in the land claimed, dated Dec. 1, 1910, and filed for record Dec. 14, 1910, a deed from B to G was properly inserted in the bill as the word “and” will be considered a clerical mispision for the word “to,” the deed otherwise complying with the recitals.

2. *Evidence; Res Gestæ; Execution of Mortgage.*—Where a married woman, in the absence of the mortgagee, refused to sign a mortgage when requested to do so, stating to the justice of the peace that it was the debt of the husband, such statement was not part of the res gestæ of her execution and acknowledgment of the mortgage on a subsequent day, and hence, inadmissible as against the mortgagee.

3. *Husband and Wife; Mortgage; Partial Validity.*—Where part of the mortgage debt is the joint or several indebtedness of the wife.

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a mortgage executed by her is valid to the extent it secures the payment of her indebtedness.

4. *Same; Separate Property.*—A wife seeking to avoid a mortgage because securing a debt of the husband has the burden of showing that her relation is that of surety only to the indebtedness secured by the mortgage.

5. *Same; Notice to Mortgagee.*—Without regard to notice of the fact that the mortgage was given by the wife to secure the debt of the husband to the mortgagee, such mortgage given by the wife is invalid, and a charge that there is a presumption of law that the mortgagee knew that the wife signed as surety in such case, is erroneous.

6. *Charge of Court; Ignoring Issue.*—A charge as to what will constitute the debts of the wife and not of the husband, which omits to incorporate the essential facts that the acts enumerated were referable to the indebtedness secured by the mortgage which the wife was seeking to avoid, was properly refused, as ignoring issues.

7. *Same; Undue Prominence.*—Charges giving undue prominence to a particular portion or portions of the evidence are refused without error.

APPEAL from Marengo Circuit Court.

Heard before Hon. JOHN T. LACKLAND.

Ejectment by Isidore Bley and others against Maggie M. Lewis. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

The exceptions to evidence and other facts sufficiently appear in the opinion. The following is charge 10 given for defendant: (10) I charge you that if the mortgage when signed by defendant was to secure a past debt of the husband, although you further find that said mortgage was for a security for future advances, it is a void mortgage, and no act on the part of defendant can give life to it. A. If you believe from the evidence in this case that defendant signed the mortgage and note of date February 7, 1903, as security for the husband's debt, then it is a presumption of law that the payees of said note and mortgage knew that she executed the note and mortgage as surety, if you further find from the evidence in the case that the said note and mortgage was signed jointly by defendant and her husband.

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The following charges were refused plaintiff: X. If the jury are reasonably satisfied from the evidence that Maggie M. Lewis permitted her husband to buy goods from Mayer Bros., and to have same charged to her account, and to manage, control, and rent out her lands, and collect the rent, and the crops grown thereon, and dispose of the same, and that with full knowledge of the same Maggie Lewis paid for the goods she bought and ratified her husband's acts as her agent, and that such acts and doings were committed for many years, and were ratified by Mrs. Lewis, then, although goods, wares, and merchandise were actually delivered to Mr. Lewis, but upon the credit of Mrs. Lewis, then a debt so contracted would constitute a debt of Maggie Lewis, and not of her husband.

Z. The court charges the jury that by the mortgage bearing date January 30, 1896, Mrs. Lewis constituted her husband her agent to buy goods from Mayer Bros., for her during said year, and if the said Lewis, acting under said authority, did buy goods from Mayer Bros., then such a debt would be the debt of Maggie Lewis, and not the debt of her husband.

ELMORE & HERBERT, and BESTOR & YOUNG, for appellant. The court erred in giving charge 10 for defendant.—*Mills v. Hudmon*, 57 South. 739. Charge A incorrectly places the burden of proof.—*Mills v. Hudmon*, *supra*; *Elkins v. Bank of Henry*, 60 South. 96; *Marbury L. Co. v. Woolfolk*, 65 South. 43. On these authorities, the court erred in the other charges given and refused. What Mrs. Lewis said to the justice of the peace the day before she signed and acknowledged the deed was not of the res gestae of that transaction, and in the absence of the mortgagee in no way binding on him.—*Stallings v. Hudson*, 49 Ala. 159; *Gibson v. Wallace*, 147 Ala. 322.

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J. M. MILLER, for appellee. The deed purporting to be set out in the bill of exceptions is not the deed described in the directions therein contained.—73 Ala. 348; 73 Ala. 352; 77 Ala. 380; 96 Ala. 376; 108 Ala. 640. The bill of exceptions should be stricken because it is a mere copy of the stenographer's notes.—155 Ala. 673; 169 Ala. 490. With the bill out, no questions are raised for decision.

McCLELLAN, J.—This is an action in statutory ejectment. Isidore Bley, James F. Compton, and Benjamin F. Gregory are the plaintiffs (appellants); and Maggie M. Lewis is defendant (appellee). In the paper signed by the presiding judge as for a bill of exceptions on appeal to this court, this recital appears: "The plaintiff offered in evidence a deed from Isidore Bley and B. F. Gregory conveying the undivided one-third interest in the land *asked* for dated December 1, 1910, filed for record December 14, 1910. (The clerk will here insert the above deed)."

With the evident purpose of complying with the direction given in the quoted recital of the bill of exceptions, the clerk of the circuit court of Marengo county, whose duty it was to prepare the transcript for appeal, inserted in the part of the transcript devoted to the bill of exceptions, and at the appropriate place therein, a deed corresponding in date of execution and in date of filing for record with the descriptive words and figures appearing in the quoted recital and according with the character of interest or title mentioned in that recital; but the deed so inserted, in copy, by the clerk, was one in which Isidore Bley was grantor and B. F. Gregory was grantee, and it described the land sued for in the complaint in this cause. Motion is now made by the appellee to strike the paper so inserted by the clerk;

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and this upon the notion that either the direction in the quoted recital is too uncertain in identification of the paper to be inserted, or the instrument in fact inserted by the clerk is not the paper called for in the quoted recital of the bill.

In our cases of *Looney v. Bush*, Minor, 413, *Pearce v. Clements*, 73 Ala. 256, and *Elliott v. Round Mountain C. & I. Co.*, 108 Ala. 640, 18 South. 689, the pertinent rule—written with great strictness, but no more so than the public importance of its subject exacts—is set down. It will not be departed from at this late day, nor will its effectiveness be impaired in practical administration. Mindful as we are of the rule for particular definiteness of identification in order to effect the lawful insertion in a bill of exceptions of a paper referred to and thus incorporated as a part thereof, we cannot find in the circumstances here involved such degree of uncertainty of identification as would permit the striking of the paper mentioned, to which action the appellee moves us. The rule, in such cases, is satisfied if the reference identifies the document in a way “to reasonably exclude a mistake with reference thereto.” Here the paper inserted accords with the direction in the bill in respect of the date of execution and the date of filing for record. It is manifest that the word “and,” appearing between the names in the recital, is a clerical misprision only. The use, in referring to a deed, of the word “from” before the first name, confirms that fact. Gregory is one of the parties to the suit. It is not asserted that any other instrument, according with the other elements of the direction to the clerk, was mentioned on the trial. The word “asked” is so associated with the other descriptive terms as to make absolutely certain that the purpose in its use was to refer to the land in suit.

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The motion to strike the whole bill and to strike the part thereof containing the deed from Bley to Gregory is overruled.

There is no merit in the motion to strike the bill of exceptions because violative of rules of Supreme Court practice governing the form and character of bills of exceptions.

The plaintiffs' right to recover is rested on a mortgage executed on the 7th day of February, 1903, by Maggie M. Lewis and her husband, A. M. Lewis, describing lands owned by the wife. The mortgage was foreclosed under the power, and Bley became the purchaser at the foreclosure sale. Each of the plaintiffs owns, if the mortgage was valid, an undivided one-third interest in the lands sued for. The defense asserted is that the indebtedness for the security of which the mortgage was given was the debt of the husband, and not that of the wife; and, if so, the instrument was void under the statute.—Code, § 4497. The evidence on the trial was in conflict on this point, and so the solution of the issue was the jury's province.

There were a number of rulings on the admission or rejection of evidence. Except that to be now considered, none of these, of which appellants complain, appear to have been affected with prejudicial error. The court permitted Mrs. Lewis to adduce testimony to the effect that Mrs. Lewis declared, in the presence of Allen, the justice, on the day previous to the day on which Allen took her acknowledgement of her execution of the mortgage of February 7, 1903, but without the presence of Mayer Bros., the mortgagees, that the debt, which the mortgage was to secure, was the debt of her husband, A. M. Lewis, and not her debt; the court expressly limiting this testimony "to the fact [in dispute] as to whether it was her debt and she was surety for it." Unless the declaration

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mentioned was of the *res gestae* of the execution of the mortgage—the fact of its execution being admitted by Mrs. Lewis—it was inadmissible, and was erroneously received in evidence even though limited as the court undertook to do; for, if not of the *res gestae* of the execution of the instrument, it, at best, was self-serving only. It appears that the justice went to Mrs. Lewis' home to perfect the description of the land in the mortgage—through information to be and that was obtained from her husband—and Mrs. Lewis was then asked to sign the instrument and give her acknowledgment of its execution, but then flatly declined, stating it was not her debt. The next day she went to the home of the justice and there executed the instrument, giving her acknowledgment in the usual way. Obviously, what took place between the justice and Mrs. Lewis on the day previous to the execution of the instrument was not so related to the fact and act of execution as to render it a part, and explanatory, of the act and fact of execution of the instrument. It was not an element of the negotiations, between the parties, leading to the consummation of a binding obligation between them, as was the circumstance in *Weaver v. Lapsley*, 42 Ala. 601, 94 Am. Dec. 671, and in *Marks v. Bank*, 79 Ala. 550, 58 Am. Rep. 620.

There was evidence tending to show that a sum paid by the mortgagees, Mayer Bros., to satisfy a prior mortgage given by Mrs. Lewis on this land to a "Syndicate," formed a part of the indebtedness for the security of which the mortgage to Mayer Bros., of date February 7, 1903, was given.

Where a part of the mortgage indebtedness is the joint or several indebtedness of the wife, the mortgage is valid to the extent it secures the payment of her indebtedness, and passes the legal title.—*Mills v. Hudmon*, 175 Ala.

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448, 57 South. 739. The burden of proof is on the wife seeking to avoid the incumbrance of her property to show that her relation is that of surety only to the indebtedness secured by the mortgage.—*Mills v. Hudmon, supra*.

Charge 10, given at the defendant's request, was affected with prejudicial error. Under it the invalidity of the mortgage was predicated of the securing of a "past debt of the husband," notwithstanding there was evidence tending to show that another part of that indebtedness was the wife's. The charge is not, under the evidence here, merely calculated to mislead, so as to put the opposing party to an explanatory instruction.

Charge X., refused to plaintiffs, omitted to incorporate in its hypothesis the essential fact that the acts enumerated were referred or referable to the indebtedness secured by the mortgage of February 7, 1903. It was faulty on that account, justifying its refusal.

Charge Z was properly refused to plaintiffs. It was subject to the substance of the criticism just made of charge X; and, besides as written, it was faulty in giving undue prominence to a particular feature of the evidence.

Charge A, given for the defendant, should not have been so favored by the court. It interjected an issue, as upon a presumption of law, not properly in the case. A mortgage given by the wife on her property to secure an indebtedness of the husband, only, is invalid without regard to notice of the fact to the mortgagee. There is no presumption of law prevailing in such circumstances; for the basis of the asserted presumption is wholly unimportant and immaterial. This charge may quite reasonably have had prejudicial influence upon the minds of the jury, by impressing them with the unfounded notion that the law imputed notice to the mortgagees in conse-

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quence of the hypothesized fact of the wife's suretyship.

For the errors committed in admitting the evidence indicated above and in giving charge 10, the judgment is reversed and the cause is remanded.

Reversed and remanded.

SAYRE, DE GRAFFENRIED, and GARDNER, JJ., concur.

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Ejectment.

(Decided February 5, 1914. Rehearing denied July 2, 1914.
66 South. 188.)

Deeds; Description; Certainty of Location.—The deed in this case examined, together with the maps and the description in the complaint, and it is held that the deed was void for want of certainty of description, for the reasons stated in the opinion.

(de Graffenried, J., dissenting.)

APPEAL from Elmore Circuit Court.

Heard before Hon. W. W. PEARSON.

Ejectment by A. F. Wilson against T. J. Carling, as trustee, etc. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 177 Ala. 85, 58 South. 417.

The complaint in its original form is as follows:

The plaintiff sues to recover possession of a certain tract of land, situated in Elmore county, Alabama, described as follows, to wit: Parts of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, section 22, township 19, range 18 east, and the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 21, township 19, range 18 east. Said land being bounded by a line, which said line begins at a point, which said point is ascertained in the following way: Commence at a point 939 feet east of the S. W. corner of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 22, township 19, range 18 east; thence running north 42 de-

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gress west, 795 feet; thence running north 13 degrees west, 190 feet, to a point, said point being the beginning of the line which bounds the land sued for in this complaint; thence running east, 358 feet, to the Coosa river; thence following the meanders of the Coosa river to the point where the said Coosa river intersects with the northern boundary line of said section 21, township 19, range 18 east; thence running west along said line 358 feet; thence running in a general southeasterly direction to the point of beginning, said last-mentioned line being parallel with the said Coosa river, following its meanders at a distance of 358 feet, said last-mentioned line being so located that at any point along said strip of land inclosed therein, a line drawn due east and west will measure 358 feet from said Coosa river to said last-mentioned line—of which said land plaintiff was in possession, and upon which, pending such possession, and before the commencement of this suit, defendant entered and unlawfully withholds, together with the sum of \$1,000.00 for the detention thereof.

The following is the amended complaint:

The plaintiff sues to recover the following tract of land, viz., 20.06 acres described as follows: Commencing on the west bank of the Coosa river, where the east and west line dividing in the middle section 22, township 19, range 18, strikes the river; thence up and along the west bank of the river to the south line of section 16 of same township and range; thence west, along the south line of section 16, 390 feet; thence southeasterly, to the west end of Cohn & Goldberg's line on the east and west line dividing section 22 in the middle, and 390 feet from the Coosa river; thence east, along said Cohn & Goldberg's line, with said east and west line, 390 feet, to the point of beginning—of which he was in possession, and upon which, pending such possession, and before the

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W. A. GUNTER, for appellant. The description and identity of the res was sufficient and definite, and to declare the deed void for uncertainty would be contrary to the settled maxim always to construe ut res magis valeat quam pereat.—2 Dev. on Deeds, § 1045; *Wilson v. Roper*, 74 Ala. 148; 6 Cranch. 148; *Gaston v. Weir*, 84 Ala. 193; *Ainsa v. United States*, 161 U. S. 228; *White v. Luning*, 93 U. S. 523; *Blanc v. Rice*, 20 Pick. 62; 32 A. D. 204; *Hodges v. Denny*, 86 Ala. 230; other authorities may be seen in 13 Cyc. 639; *Oakes v. DeLaney*, 133 N. Y. 227; *Watson v. City New York*, 73 N. Y. Supp. 1027; Words & Phrases, Vol. 5, p. 4585 *et seq.*; 2 Devlin on Deeds, 3 Ed., Secs. 1045-6.

RUSHTON, WILLIAMS & CRENSHAW, and F. W. LULL, for appellee. The deed was void in description, and the court properly so held.—*Hurt v. Freeman*, 63 Ala. 335; 107 Mass. 518, and opinion on former appeal in this case 58 South. 417.

MAYFIELD, J.—The only question for decision is whether or not the description of land in a certain deed is void absolutely, for uncertainty. The description is in words and figures as follows:

“Twenty-five acres more or less in fractional sections 21 and 22, T. 19, R. 18, Elmore county, Alabama, on the West side of the Coosa river, bounded on the south as follows: By Cohn & Goldberg; on the north by lands owned by the state of Alabama; on the west by the undersigned, the west line to be established by survey, bounded on the east by the Coosa river.”

The geometrical proposition involved in the description in the deed in question, abstractly speaking, is this: Given, the length and direction of one side of a quadrangle containing “25 acres more or less,” and the direction of two other sides which are parallel, each to the other,

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construct the fourth side so that one of the parallel lines shall not exceed 396 feet, and the other shall not exceed one mile in length.

This we think can be easily done. In fact, we think an indefinite number of figures may be constructed, any one of which will equally meet the requirements of the proposition.

This is the second appeal in this case. The report of the former appeal may be found in 177 Ala. 85, 58 South. at page 417. The concrete question involved on the first appeal, and the only question involved on this appeal, is whether or not the deed under which appellant claims title was void for uncertainty of description of the lands attempted to be conveyed. It was decided on the former appeal that the deed was void. An application for a rehearing was made, on the hearing of which another full consideration of the case was had by the entire court; each judge giving it a thorough consideration, and the unanimous conclusion of the court, upon the application, was the same as that reached on the original hearing. The case has been twice fully and ably argued orally, as well as in a number of written and printed briefs, by able and eminent counsel for appellant, and, as strange as it may appear to counsel, we are yet of the opinion that the deed in question is absolutely void on account of uncertainty in the description of the lands attempted to be conveyed.

But for the ability, the learning, and the eminence of counsel who represents the appellant on this appeal, and the earnestness with which he now insists that we were in error in the opinion and decision on the former appeal, we would merely affirm, upon the opinion rendered on the former appeal.

The opinion on the former appeal did not answer all the argument made on this appeal, for the all-sufficient

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reason that some of the argument now made was not advanced on the first appeal, but a different argument was then made and a different reason assigned, by counsel, to show why the deed was not void. We do think, however, that the opinion did sufficiently answer the argument made on that appeal.

The body of land described in the former complaint, which was then alleged and claimed to be the land described in the deed, is entirely different in area, and in every dimension except its eastern boundary, from that described in the present complaint, and now insisted to be the land described in the deed. The description in the present complaint is materially, if not entirely, changed. Indeed, no one reading the two complaints would ever suspect that they were intended to describe the same body of land, or that either described the identical body of land attempted to be described in the deed.

But, as was said in the opinion on the former appeal, the description in the deed is so uncertain that any number of bodies of land could be carved out of the fractions of sections 21 and 22, any one of which would, with equal certainty, answer to every call in the deed. It was for this reason that the deed was then, and is now, held to be void.

It appears from an inspection of the records on the two appeals that a number of surveyors have attempted to locate the land described in the deed, and that no two fix upon the same body. It also appears that the same surveyor, who made the surveys for the appellant, located different bodies of land on the two appeals. There were exhibited, on both of the trials in the lower court, maps, made by the appellant's surveyor, designed and intended to locate and describe the same lands described in the deed; and the two bodies of land located by these maps are greatly, if not entirely, different. It is true

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that each contains some land embraced in the other, but each contains some land which the other did not.

These maps, together with the original and the amended complaints, the reporter will set out, as near as may be, in the report of this decision.

Appellant has had a number of counsel engaged in the trial of this case, and all of his counsel have not agreed as to the particular body of land described in the deed; nor has each attorney always had the same opinion as to the exact body of land described in the deed. Counsel for appellant on this appeal attaches to his brief a diagram and plat of the body of land which he now claims is described in the deed, which is practically the same as that made by the engineer or surveyor, and attached to the transcript as an exhibit. The same counsel, on his application for a rehearing on the other appeal, not content with the diagram and plat made by the surveyor and attached to the transcript as an exhibit, made a map and plat entirely different from either of those made by the surveyor and attached the same to his brief. And this diagram is very different from the one he attaches to his brief on this hearing, as well as from the first maps and plats made by the engineer, contended by other counsel to correctly locate the land described in the deed.

The reporter will set out, as near as may be, a copy of the map or plat contained in counsel's brief on his said application for a rehearing.

In the original brief filed on the first appeal in this case (page 8 of the printed copy), in attempting to distinguish this case from cases relied on by opposing counsel, and to describe the body of land sued for, and described in the deed in question, counsel for appellant said:

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"In the case at bar the Coosa river is the east boundary line and the only line not definitely fixed by the evidence is the west line. Under the decisions above cited, the west line must be a line exactly parallel with the Coosa river following its meanders, and located at such a distance as to include twenty-five acres."

It should be said that this was different counsel from the one who now insists that the west line is a straight line, without any regard to the meanders of the river. But while it is true that counsel, who now claims that the west line is a straight line, was counsel on the application for a rehearing and made the same claim, yet the straight line contended for on the application is not the same straight line he now insists upon. The two lines connected at different points, were of different lengths, and established different areas of land.

On the first appeal, this same counsel contended that the deed conveyed 25 acres exactly, if that area was to be had in fractions of sections 21 and 22, and there has never been any dispute that these fractions contain much more than 25 acres.

On the first appeal this same counsel contended that the phrase "more or less," contained in the deed, was meaningless if 25 acres could be found in fractions 21 and 22, north of Cohn & Goldberg's land and west of the Coosa river. Counsel in his brief in the application for a rehearing (pages 9 and 10), among other things, said:

"Now, here, the first sentence in the deed shows a clear contract to sell and convey by the acre at the price of fifty dollars per acre, and there is no lump sum to support a sale in gross. Therefore the sale is one by the acre.

"Can we construct the plat on that theory? We have shown that we can. Then the words 'more or less' are senseless, and must be rejected or held to have been put

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in as precautionary words, to prevent the grantor from being held liable for the precise number of acres if not to be found in the plat as constructed."

"Here the land was to be measured out of the grantor's land, and therefore 25 acres 'more or less' meant 25 acres absolutely, if that quantity was in the sections.

"And here the gross sum to be paid was \$50 per acre, which could only mean \$50 multiplied by 25 acres; there being no other process of obtaining an aggregate, therefore 'more or less' must be rejected or applied as suggested above to cover a possible deficiency of land in the section 21.

"Again, the western line is to be surveyed, which could only be done by taking 25 acres absolutely if in the section. And still again 'other parts of the deed' confirm this view, for the first sentence expressly says the whole consideration is \$5 paid and \$50 per acre to be paid 'for 25 acres,' and not for 25 acres 'more or less,' which would be nonsense.

"All this shows that 'more or less' must be rejected or held to refer to a possible deficiency of land in the section to fill out the call for 25 acres."

Counsel now, not only concedes, but contends, that effect must be given to the phrase "more or less," and that the quantity conveyed was not 25 acres absolutely, but was considerably less. Exactly how much less than 25 acres is yet left in uncertainty, from the pleadings, the argument, and the evidence, as we shall show.

The complainant claims 20.06 acres, and the argument in part contends for that amount, but in the complaint he describes a body of land which is by the evidence shown to contain much less than 20 acres.

The diagram introduced by appellant and attached as an exhibit to the transcript, and a copy of which is attached to appellant's brief, shows a parallelogram, A,

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B, C, D, the opposite sides of which are 3,020 and 390 feet, respectively. This parallelogram, of course, contains 20.06 acres, which is the amount of land claimed in the complaint and contended for in argument, and which appellant seeks to be put in possession of, by the judgment and process of the courts; but this same diagram, and the other evidence, shows that 4.44 acres of that 20.06 acres lies east of the water's edge, and under the waters of the Coosa river, which, of course, there was no attempt or intention to convey. The diagram also shows a strip of 1.59 acres east of the eastern line of the parallelogram, but west of the water's edge of the Coosa river. The meanders described in the complaint are not those of the thread of the river, of its water's edge, nor of the river generally, as referred to in the deed; but are those of the "banks" of the river. If this bank should be held to be the high-water mark, and not the low-water mark, then the complaint, as explained by the evidence and the diagram, would describe much less than 20.06 acres as claimed; it would, under such construction and diagram, contain less than 15 acres. The meaning of the word "bank," when used in describing boundaries on navigable and nonnavigable streams, and the difference between the meanings of the words, "bank," "stream," "river," and "waters," when used in the description of boundaries, may be found in Words & Phrases (volume 1, p. 689), under the heading "Banks;" but it is not necessary to a decision of this case for us to define the word "bank," for the word is not used in the description contained in the deed, but only in that contained in the complaint.

We are unable to understand, even by the aid of the argument of counsel, how it is that the description in this deed authorizes the construction of a parallelogram, A, B, C, D, on the base A, B, which is 390 feet,

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from which the land sold and conveyed is to be selected. We must confess that we are unable to do so, though, as counsel argues, "schoolboys" would have no difficulty in locating the land sold and conveyed, from the description in the deed, and though we are shown, in minutest detail, how the schoolboys would proceed to construct the parallelogram and to thereby locate 20.06 acres of land which would answer to every call in the deed. In the first place, we cannot understand why we should arbitrarily adopt the base, A, B, 390 feet, upon which to construct the parallelogram, if a parallelogram must be constructed; notwithstanding counsel tells us it is because this is the parallelogram which comes nearest to containing 25 acres, within the calls of the deed. The deed says that the land conveyed is bounded on the south by Cohn & Goldberg—meaning, of course, Cohn & Goldberg's land. The northern boundary of Cohn & Goldberg's land, referred to as the southern boundary of the land in question, is shown to be 396 feet in length, by actual measurement—at least, the deed from Holt to Cohn & Goldberg describes it as having been actually measured, and as being *six chains* in length. Now, when we were schoolboys and studied surveying, a surveyor's or "Gunter's" chain (we infer this is the kind of chain meant) was 66 feet in length; and according to the multiplication table in use at that time $66 \times 6 = 396$, and not 390. If the length of this chain, or the multiplication table, has ever been changed, we have no judicial or other knowledge of the alteration. And we cannot accept or adopt the argument of counsel, predicated on a change in either of these standards, notwithstanding we recognize the great ability and learning of counsel making the argument, and notwithstanding he bears the same name as the honored inventor of the chain. We likewise cannot understand how it is that this particular

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parallelogram, A, B, C, D, constructed on the base A, B, which is 390 feet, and its other side 3,020 feet, of all possible parallelograms comes nearest to giving the exact area of 25 acres, the calls of which shall correspond to those of the deed. If this particular parallelogram contains only 20.06 acres, a similar parallelogram, constructed on a base of 396 feet, the full length of the Cohn & Goldberg line, would certainly come nearer to containing 25 acres than does the one actually constructed by counsel. Such figure similarly constructed on the base of 396 feet would also contain less than 25 acres, but more than 20.06 acres, and therefore nearer 25 acres.

We likewise cannot understand the necessity or the propriety of constructing any parallelogram, from which the land in question is to be taken, if all the land in the parallelogram is not to be taken or is not described in the deed. If the land described is described so as to show that it forms a parallelogram, a square, a rectangle, or a circle, we can then understand the necessity and the propriety of constructing, marking out, and ascertaining the boundaries of such figure, whatever it may be; but we know of no rule of law, of mathematics, or of surveying, which authorizes, much less requires, the construction of a parallelogram from which must be selected a part or all of another and different quantity of land described and shown *not to be* a parallelogram, but to be a figure one or more sides of which are made up of crooked or broken lines.

We cannot apprehend why we should not, just as well and just as appropriately, construct a square or a circle, including all or any part of the land mentioned in the deed, from which the lands conveyed should be selected, as construct the parallelogram constructed and contended for by counsel in this case.

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The parallelogram, A, B, C, D, is not claimed to inclose the exact land conveyed, but the claim is that it incloses the *quantity* of land conveyed by the deed. The diagram shows on its face that it contains some land *not* conveyed, and that some of the land conveyed lies outside of it, and to the east of it. How, therefore, can it be said to contain the quantity conveyed?

The deed says in terms that "the west line is to be established by a survey." If counsel's theory is correct, there would be no necessity to establish this west line by a survey, as the one he claims is merely a straight line between the points A and D.

As before stated, it was first contended in this court, though not by counsel now appearing, that the west line had to be surveyed, and was a crooked, or broken line, corresponding to the east boundary which followed the meanders of the river. While we could not agree to that contention, we think it more tenable than the one now presented.

If anything is made certain by the description in the deed, it is that the western boundary of the land intended to be conveyed was not then known, but was "to be established by a survey," and was to be a crooked or broken line; yet, under counsel's theory, this is the one line or boundary made definite, fixed, and certain, by the other calls in the deed, and the only one that would not have to be measured to know its length.

We cannot ratify the theory and contention of counsel for appellant, and the judgment of the lower court must be affirmed.

Affirmed. All the Justices concur, except DE GRAF-FENRIED, J., who dissents.

[Childs v. Floyd, et al.]

Childs v. Floyd, et al.*Ejectment.*

(Decided November 7, 1914. 66 South. 473.)

Adverse Possession; Notice; Failure to Give.—Where defendants held possession of lands from 1895 to 1913, under a bona fide claim of inheritance, asserting that their ancestor was in possession, while in fact, such ancestor had only an estate by curtesy, defendants' holding ripened into an adverse title prior to the adoption of the Code of 1907, and as section 1541, Code 1896, did not require filing of notice in such cases, defendants were not required to file such notice, and they held an adverse claim, although they failed to file the notice required by the Code of 1907.

APPEAL from Pike Circuit Court.

Heard before Hon. H. A. PEARCE.

Ejectment by W. A. Childs against S. C. Floyd and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The suit is for 80 acres of land, which was originally owned by B. E. Floyd, who deeded it to his wife, M. G. Floyd, in 1880, he and his wife thereafterwards occupying it jointly as their homestead until the death of the wife in 1887. B. E. Floyd then married a second time, his wife being S. C. Floyd, and to this union several children were born. They continued to live on the land until B. E. Floyd died in 1895. According to the undisputed testimony of the widow, B. E. Floyd claimed to own the land while she lived on it with him, and told her to stay there, pay the taxes, and raise the children on it. He had no other land, and after his death she and her two children occupied the land, claiming it and using it as their own, and paid taxes on it regularly down to date. This widow and children are now defendants here, and their claim of title is based upon their adverse possession of more than 10 years after the death of the life tenant. By his first marriage B. E. Floyd left surviving him two

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children, the heirs of his first wife. Plaintiff was the husband of one of these children, Lizzie, now deceased, and as surviving husband, he claims a life estate in her undivided one-half interest in the land by descent from her mother, said M. G. Floyd. Plaintiff did not discover that he had any claim to the land until 1913, and prior thereto neither he nor any one else had claimed the land or objected to defendant's possession or acts of ownership. There was no evidence that defendant filed notice of their claim as required by section 1541, Code 1896, nor any color of title as required by section 2830, Code 1907. The plaintiff moved for a new trial after a verdict for defendant and judgment thereon, on the ground that the evidence was not sufficient to support the verdict, and that the verdict was contrary to the law and the evidence, and plaintiff appealed from the judgment overruling his motion.

A. C. WORTHY, for appellant. The title being in possession of the wife of Floyd, the possession is referred to title, and does not show adverse possession as between Floyd and his wife.—*Anglin v. Flowers*, 142 Ala. 264; *Larkin v. Beatty*, 111 Ala. 303; *Allen v. Hamilton*, 109 Ala. 634. The husband held only by curtesy, and the adverse possession against the remaindermen was not sufficiently shown.—*Pickett v. Pope*, 74 Ala. 122. Defendants were not exempted by the provisions of § 1541, Code 1896, from filing the notice of their adverse claim.—*Brasher v. Shelby I. Wks.*, 144 Ala. 659.

JOHN H. WILKERSON, for appellee. The holding by another adversely to the remainderman, after the death of the life tenant, may become adverse and ripen into title.—*Pickett v. Pope*, 74 Ala. 122; *Pendley v. Madison*, 83 Ala. 484; 1 Cyc. 1057. The possession was under bona fide claim of inheritance, and had ripened into title be-

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fore the adoption of the Code of 1907, and hence, no notice of the adverse claim was necessary to be filed.—§ 1541, Code 1896.

SOMERVILLE, J.—On the undisputed evidence, the defendants had such possession of the land in question from 1895 to 1913 as would ripen into title against the plaintiff's claim, provided they come within the exception to the statute (Code 1896, § 1541) dispensing with the filing of notice of their adverse claim in the office of the judge of probate. Under that statute—in force until the adoption of the new Code in 1908—they were not required to file such notice of claim if they entered upon the land under a "bona fide claim of inheritance." The evidence amply supports a finding that they were such claimants.—*Jordan v. Smith*, 185 Ala. 591, 64 South. 317.

It was of course not necessary that their ancestor had a good title, nor that he believed he had a good title. Nor was it material to this inquiry that his possession—being that of life tenant by curtesy—could not become adverse to the remaindermen.

As the jury might have found that the defendants' title was perfected by adverse possession after 1905, and prior to 1908, it is not necessary to discuss the operation of section 2830 of the Code of 1907, though it seems clear that under its changed provisions the defendants' possession would have remained adverse and effective, since they derived title by descent cast from an ancestor who, according to the evidence, died in possession of the land, which he claimed to own while alive.

We conclude that the trial court did not err in overruling the motion for a new trial.

Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

[Prince v. Prince, et al.]

Prince v. Prince, et al.*Ejectment.*

(Decided June 18, 1914. Rehearing denied July 25, 1914.
66 South. 27.)

Adoption; Validity of; Statutes.—Under section 5202, Code 1907, an instrument adopting a child which does not show an acknowledgment by the adopting parent before the probate judge, is without effect, unless there is evidence that the adopting parent actually acknowledged the instrument before the probate judge; the mere fact that the adopting parent and child exercised the rights and performed the duties of the relation of parent and child for about thirty years, and until the death of the adopting parent, does not relieve the child of the necessity of such proof.

APPEAL from DeKalb Circuit Court.

Heard before Hon. W. W. HARALSON.

Ejectment by John G. Prince and others, against Joe S. Prince. Judgment for plaintiffs and defendant appeals. Affirmed.

HUNT & WOLFES, for appellant. Declaration of adoption in Alabama is more in the nature of a deed than anything else.—*Abney v. DeLoach*, 84 Ala. 394. Acknowledgement dispenses with the necessity of witnesses, and makes an instrument self proving, but where witnesses are properly shown a paper is duly attested.—§§ 3374, 3357, 3382, Code 1907; *White v. Hutchins*, 40 Ala. 257; *Jordan v. McClure*, 170 Ala. 313. The adoption being more than thirty years old, it was valid as an ancient document.

ISELL & SCOTT, for appellee. The adoption was not in conformity to the statute, and it was therefore necessary that proof be made that the instrument of adoption was acknowledged before the probate judge.—§ 5203, Code

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1907; *Abney v. DeLoach*, 84 Ala. 393. This case falls within the influence of *O'Neal v. T. C. I. & R. R. Co.*, 140 Ala. 378, and authorities there cited.

DE GRAFFENRIED, J.—Section 5202 of the Code of 1907, which is now and was operative as the law of this state at the time to which we hereafter refer, provides as follows: "Any person desirous to adopt a child so as to make it capable of inheriting his estate, real and personal, or to change the name of one previously adopted, may make a declaration in writing, attested by two witnesses, setting forth the name, sex and age of the child he wishes to adopt, and the name he wishes it thereafter to be known by, which, being acknowledged by the declarant before the judge of probate of the county of his residence filed and recorded, * * * has the effect to make such child capable of inheriting such estate of the declarant, and of changing its name to the one stated in the declaration."

1. Our laws of descent and distributions are of statutory creation, and, as the status of parent and child has always influenced legislative action in determining what shall become of the property of those who die intestate, it was appropriate that, in the statute which we have above quoted, our Legislature should provide that an adopted child should be capable of inheriting the estate of the person adopting him. The status of the parties being fixed, it was appropriate that all the incidents usually attendant or flowing out of the relations so established should attach to both the adoptive parent and child. For this reason this court has held that an adopted child is entitled, during minority, to claim exemptions out of his adoptive parent's estate.—*Cofer v. Scroggins*, 98 Ala. 346, 13 South. 117, 39 Am. St. Rep. 54.

"The primary object of the statute would seem to be,

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to allow any person to adopt the child of another and make it capable of inheriting his estate, if he should die intestate, or to change the name of one previously adopted. But, a liberal intendment and operation should be given to the statute."—*Cofer v. Scroggins, supra; Tilley v. Harrison*, 91 Ala. 297, 8 South. 802.

2. In the instant case the facts are that William T. Prince, on August 14, 1880, adopted Simeon Jones, a child then 3 years of age, and in the instrument declared that said Simeon Jones should be capable of inheriting his real and personal property, and that his name should be Simeon Jones Prince. It is inferable from the bill of exceptions that from the day that the adoption took place until the death of the foster father, about 30 years afterwards, the said Simeon Jones Prince lived with the said William T. Prince, as his child, and, as such child, performed services for the foster parent. During all this period it is also inferable that the said William T. Prince recognized and held out to the world as his adopted child the said Simeon Jones Prince. In other words, it is inferable from the bill of exceptions that for about 30 years—from the day of the adoption until the death of William T. Prince—the status of parent and child openly existed between the parties.

3. It appears from the bill of exceptions that after the death of said William T. Prince diligent search was made for the articles of adoption, but that they were not found. If any one has seen the articles since they were recorded on the minutes of the probate court of DeKalb county the record fails to show it. The probate record shows that the articles conformed to every requirement of our statutes, except that the minutes of the probate court fail to show that the articles were acknowledged before the judge of probate by the foster father. The trial court was of the opinion that, for this reason, the

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said Simeon Jones Prince—or, as he now writes his name, Joe S. Prince—failed to show a legal adoption, and for that reason is not entitled to be treated as the heir of said William T. Prince, who, it appears, was a childless man.

4. The sole question before us, then, is: Has this court the right to presume, or to leave it to a jury to presume, in aid of a status which, for 30 years, existed between the parties, that the foster parent actually acknowledged the instrument before the probate judge, but that the clerk, in recording the instrument by a clerical omission failed to record the acknowledgment? The act authorizing the adoption of children is, as we have already said to be liberally construed for the purpose of carrying out the humane purposes of the act. The Legislature, however, in passing the act, had a right to say *how* the instrument evidencing the adoption should be executed. In creating the right to adopt, it had a right to say what formalities shall be observed by those who desire to exercise that right. It had a right to require that such instruments should be acknowledged by the foster parent and to make this acknowledgment a necessary part of the due execution of the instrument. In other words, it had a right to say that such an instrument, *to be effective*, should, before it became effective, be acknowledged before the judge of probate. A liberal interpretation is to be given the statute, but this has not been held to apply to the acts which, in order that the legal relation of foster parent and adopted child may be created, the foster parent must, under the direction of the statute, do. The failure of the judge of probate to record the instrument does not destroy the operation of the statute.—*Abney v. DeLoach*, 84 Ala. 393, 4 South. 457. The instrument, however, must be filed for record in the probate court to be effective, as it is wanting in effi-

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cacy until so filed, and the act of filing is one which the statute exacts of the foster parent.—*Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 407; *Abney v. DeLoach*, *supra*.

5. In the case of *O'Neal, et al. v. Tennessee Coal, Iron & R. R. Co.*, 140 Ala. 378, 37 South. 275, 1 Ann. Cas. 319, this court, upon a careful consideration of the authorities on the subject, held that this court would not presume in favor of the validity of an ancient recorded deed—the original being lost—that it had been acknowledged as required by law, the record of the deed failing to show an acknowledgment. An examination of the opinion in that case will show that the conclusions of the court on the subject are based upon sound reasoning, and that the argument of Justice JUDGE in *White v. Hutchings*, 40 Ala. 253, 88 Am. Dec. 766, in which argument the other members of the court did not concur, was unsound.

In *Abney v. DeLoach*, *supra*, this court said that the instrument of adoption provided for by section 5202 of the Code of 1907 was similar to a deed, and in that case it was treated as a quasi deed. The reception by the probate judge of the deed, attested by witnesses and acknowledged as required by the act, for record, is in no sense a judicial act, and the paper when filed and recorded has about it no elements of a judicial decree. In the case of *Gantt's Adm'r v. Phillips*, 23 Ala. 275, this court, in an exhaustive opinion, reviewed the authorities touching the presumption which may be indulged, after the lapse of 30 years, in upholding a status which has, for so long a period, constantly existed. In the case of *O'Neal, et al. v. Tennessee Coal, Iron & R. R. Co.*, *supra*, this court said, referring to the rule announced in *Gantt's Adm'r v. Phillips*, *supra*: "We think there is a distinction to be drawn as to the extent of presumption to be indulged between those cases where, accompanying the possession of the property, title is relied on

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through judicial proceedings, where it is shown that the records have been loosely kept, and cases of private transactions between the parties. In the former, after great lapse of time, presumptions will be indulged in favor of the regularity of the proceedings, even to the extent of supplying important omissions, but in the latter the reason for such presumption does not exist."

The rule seems to be of universal application that the burden is on the person claiming the benefit of an alleged contract for adoption to establish it by clear, cogent, and convincing evidence. The statute, while subject to liberal construction, must, to become operative, be substantially complied with, and our statute requires, as a necessary component part of a *validly executed* instrument of adoption, that it *shall be acknowledged by the foster parent before the probate judge.*—*Abney v. De Loach, supra.*

As the statute *required* the acknowledgment, and as it *is not shown that there was an acknowledgment*, the appellant failed to show a legal right of inheritance.—*O'Neal's Case, supra.*

As the instrument is not shown to have been acknowledged, and as the acknowledgment was a necessary part of the valid execution of the instrument, this instrument comes within none of our curative acts validating the previous recordation of *valid* instruments which had been recorded without acknowledgment.

A careful examination of this record convinces us that, under the law as it has been settled by previous decisions of this court, the defendants were entitled to the general charge which the court gave to the jury, in their behalf.

The judgment of the court below is therefore affirmed. Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, J.J., concur.

[Pendrey v. Godwin, et al.]

Pendrey v. Godwin, et al.*Ejectment.*

(Decided June 30, 1914. Rehearing denied July 25, 1914.
66 South. 43.)

1. *Deeds; Description; Property Conveyed.*—A deed conveying land known as the "Jesse Myers place, described as follows" followed by a description according to government subdivision, shows a purpose to convey the Jesse Myers place, and a misdescription in the government survey, will be disregarded.

2. *Same; Construction.*—A deed should be construed to carry out the intention of the parties as ascertained from the deed itself.

3. *Estoppel, by Deed; Operation and Effect.*—Where it is sought to fasten an estoppel upon a party to a deed by virtue of a clause therein contained, it is necessary to ascertain what was meant at the time by the deed, and when the intention can be determined, the instrument must be limited in its operations by way of estoppel to accord with the intention.

4. *Same.*—Ordinarily, a grantee in a deed is not estopped by the recitals therein, but where the recital showed that the object of the parties is to make the matter recited a fixed fact, the recital is binding on all the parties and their privies.

5. *Same; Construction.*—The deeds and the facts examined, and it is held that the description in the executor's deed was conclusive on the grantee as to the land conveyed, although the grantee did not read the deed, though having full capacity and opportunity to do so, but retained it without reading it.

6. *Evidence; Parol as to Writing.*—Where a deed contains everything necessary to a correct understanding of the intention of the parties, parol evidence is not admissible to control its construction or add to its provisions.

APPEAL from Crenshaw Circuit Court.

Heard before Hon. A. E. GAMBLE.

Ejectment by S. J. Pendrey against Daniel Godwin and others. Judgment for defendant and plaintiffs appeal. Affirmed.

See also 175 Ala. 405, 57 South. 724.

M. W. RUSHTON, for appellant. It appears from the former opinion in this case that it was affirmed on the

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ground that plaintiff was estopped from maintaining his action on account of having accepted a deed from the executors of the estate of Pendry, deceased. Under the facts in this case it seems that plaintiff was not informed of the matter of estoppel, and knew nothing about the facts set up as an estoppel. Certainty and mutuality are each essential elements of an estoppel.—*Sullivan v. L. & N.*, 128 Ala. 102, and cases there cited. To work an estoppel plaintiff must have done something upon which the other party acted or had a right to act to his harm, or to a change of his status.—Authorities *supra*; *Adler v. Penn*, 80 Ala. 354; *Donahue v. Johnson*, 120 Ala. 438; *Lienkauf v. Muentner*, 76 Ala. 194.

POWELL, HAMILTON & LANE, and F. B. BRICKEN, for appellee. There is nothing in this record to differentiate it from the case made on the former appeal, and it should be affirmed on the authority of *Pendry v. Godwin, et al.*, 175 Ala. 405.

DE GRAFFENRIED, J.—J. P. Pendry on May 10, 1905, executed and delivered to S. J. Pendrey, who was his nephew, a deed conveying, in fee simple, lands which are described in the deed as follows:

“The place known as the June Franklin place, described as follows: S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$; and the place known as the Jess Myers place, described as follows: N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$; and the place known as the George Edwards place, described as follows: N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ —all in section 36, T. 7, R. 16, Crenshaw county, Alabama.”

Immediately following the above description we find the following in the deed: “And it is understood that the purpose of this conveyance is to convey to S. J. Pendrey the George Edwards place, the June Franklin place

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and the Jess Myers place, whether the above description is correct or not, and should the above description be erroneous, I hereby authorize my executors to convey the above places to said S. J. Pendrey by a proper description if the above description should be wrong."

It was the purpose of the grantor in the above deed to convey to the grantee the Jess Myers place, and he did, in fact, convey the legal title to the grantee to all of the lands embraced in the Jess Myers place. The fact that he described the place as the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, section 36, township 7, range 16, Crenshaw county, Ala., did not *conclusively* establish the description of the lands by government numbers or the acreage.

"In the face of the expressed intention in the deed to convey the land 'known as the Jess Myers place,' the government numbers given, failing to correspond, will be regarded as a misdescription."—*Pendrey v. Godwin, et al.*, 175 Ala. 405, 57 South. 724.

2. The above deed must have been made by the grantor in the realization that his death was rapidly approaching. He, in said deed, authorized his executors, if he had made a mistake in describing the lands conveyed by the deed by government numbers, to correct, by a proper instrument, such description, and the evidence discloses that, shortly after the above deed was executed, the executors made to the grantee a deed for that purpose. In the deed from the executors they described the "Jess Myers" place just as it is described in the above-mentioned deed, viz., as containing the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, section 39, township 7, range 16; no mention being made in said executors' deed of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 25, township 7, range 16. The executors expressly state that *their* deed is made in "consideration of the request in deed of May 10, 1905, executed by the said James P. Pendrey to the said S. J. Pendrey and recorded in the of-

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fice of the judge of probate in said county, Deed Book 25, page 80." The deed from the executors bears date November 16, 1905, and was recorded in the probate office of said county on said day, and while it corrects no errors in the description of the "Jess Myers place," as already stated, it does materially change the description, by government numbers, of the "George Edwards place." In other words, the deed from the executors did make some corrections in the description of the land which was conveyed by Pendrey to his nephew by said deed dated May 10, 1905, and can truthfully be said to have been accepted by the grantee for the purpose of rendering certain the description, by government numbers, of the lands actually conveyed and actually intended to be conveyed by said J. P. Pendrey to S. J. Pendrey by the deed dated May 10, 1905.

3. It appears that the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 25, township 7, range 16, *never at any time* belonged to Jess Myers. It appears, however, that many years ago Jess Myers "squatted" on the land, built a house on it, and lived on it. It further appears that he became by purchase the owner of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 36, township 7, range 16. It further appears that J. P. Pendrey bought the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 36, township 7, range 16, from Jess Myers, and that he also acquired the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 25, township 7, range 16, not from or through Jess Myers, but *from the party to whom it belonged*. The evidence is in conflict as to whether the said S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 25, township 7, range 16, was known as the "Jess Myers" place, and there was conflicting evidence as to whether the entire 120 acres embraced in the description "N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 36, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 25, T. 7, R. 16," was or was not known as the "Jess Myers place." All the evidence shows that

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the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 36, township 7, range 16, *was* known as the "Jess Myers place;" the dispute in the evidence being as to whether the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, section 25, township 7, range 16, *was* or *was not* a part of said "Jess Myers place."

4. "Clauses contained in deeds are to be construed so as to carry out *the intention of the parties*, whenever such intention can be ascertained. When it is sought to fasten an estoppel upon a party to a conveyance, by virtue of some clause or statement in it, it is proper to ascertain what was meant at the time by the language employed, and, when the intention can be determined by the deed, the deed should be limited in its operation by way of estoppel to accord with this intention."—3 Dev. on Deeds (3d Ed.) § 1310.

It will be seen from the statement of facts, which we have above given, that, up to the time when the executors executed and delivered their deed to S. J. Pendrey, there was room for dispute as to exactly what land J. P. Pendrey intended to convey to S. J. Pendrey. Undoubtedly J. P. Pendrey conveyed by his deed to S. J. Pendrey the legal title to all of the land which *he* and *S. J. Pendrey* mutually understood to be covered by the general description "*Jess Myers place*," but, since the execution by the executors of their deed and its acceptance by S. J. Pendrey, there has been left no room for parol testimony as to what lands, described by government numbers, were intended to be conveyed under the description "*Jess Myers place*."

"When the deed contains everything necessary for a correct understanding of the intention of the parties, and there is therefore no uncertainty or ambiguity, parol evidence cannot control the construction or add to the provisions of the deed."—Tiedeman on Real Property (Enlarged Ed.) p. 824, § 827.

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We have already said that the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 25, township 7, range 16, *never* did belong to Jess Myers, although Jess Myers for a period "squatted" on it. The N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 36, township 7, range 16, *did* belong to Jess Myers. No one can doubt that the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, section 36, township 7, range 16, was intended by J. P. Pendrey to be conveyed to S. J. Pendrey under the general description of the "Jess Myers place." The evidence in this case shows that, up to the time the executors made *their* conveyance to S. J. Pendrey, a jury, upon the disputed evidence in this case, *might* have found that said S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 25, was also, by J. S. Pendrey *intended* to be conveyed. Since the execution by the executors of their deed and its acceptance, there has been about this matter, as a matter of law, no further doubt. The parties themselves, by their own deed, have settled all doubt about the matter.

Ordinarily a grantee is not estopped by the recitals in his deed, but, when the recital shows that the object of the parties to the deed was to make "the matter recited a *fixed fact*," then such recital binds all the parties to the deed, and as to them and their privies the matter recited becomes a "fixed fact."—*Hays v. Askew*, 50 N. C. 63.

In the instant case the deed from J. P. Pendrey to S. J. Pendrey and the deed from the executors of J. P. Pendrey to S. J. Pendrey must be read together. By his deed J. P. Pendrey clearly intended to convey and did in fact convey to S. J. Pendrey the June Franklin place, the Jess Myers place, and the George Edwards place, in Crenshaw county. By that deed J. P. Pendrey also showed clearly his intention, in so far as he was able to do so, to *correctly* describe the lands comprised in the three places by *government numbers*. To hedge against any error in said government numbers, the said J. P.

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Pendrey, evidently then expecting an early death, provided that, if such government description so given "be erroneous, I hereby authorize my executors to convey the above places to said S. J. Pendrey by a proper description, etc." The only possible purpose of the conveyance from the executors of J. P. Pendrey to S. J. Pendrey was to *correct* any *error* which had been committed by J. P. Pendrey in his deed in the description by *government numbers*. In other words, the deed from the executors was executed for the sole purpose of *correctly* and *definitely fixing*—removing from the *realm of dispute*—the description, by *government numbers*, of the lands in Crenshaw county, known as the Edwards, Jess Myers, and June Franklin places. To hold otherwise would be to utterly disregard the language of the deed and the plain intent of the grantors when they executed the deed and of the grantee when he accepted the deed. If there is error in the description as given in the deed from the executors, it is not such an error as can be shown in a court of law.

5. The grantee, it is true, claims that he did not read the deed from the executors when it was delivered to him; that he trusted the grantors and did not discover, until long afterwards, that they had left out of the deed said S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, section 25, township 7, range 16. He still retains the deed, and it is a familiar principle that a party "having full capacity and opportunity to read a paper, and to whom there is no misrepresentation as to its contents, cannot set up his own want of attention—his failure to read it—as a fact to invalidate it."—*Goetter, Weil & Co. v. Pickett*, 61 Ala. 387.

The judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

[Garrow, et al. v. Toxey.]

Garrow, et al. v. Toxey.*Ejectment.*

(Decided November 7, 1914. 66 South. 443.)

1. *Deeds; Quit Claim; Effect.*—Although a quit claim deed does not ordinarily carry an after acquired title, yet a quit claim deed reciting that the grantor had remised, released and forever quit claimed unto the grantee in actual possession all rights and interests in possession and expectancy, so that neither the grantor nor his heirs shall or can challenge the title of the grantee, carries with it an after acquired title.

2. *Evidence; Documentary; Parol to Explain.*—Where the ambiguity in a written instrument is patent, parol evidence cannot be admitted to supply the deficiency; the rule is otherwise when the ambiguity is latent.

3. *Same; Boundaries; Parol Evidence.*—Where land was described as beginning at the southwest corner and running thence south, etc., parol evidence is admissible to show that the starting point should have been the northwest instead of the southwest corner, since the ambiguity is not patent, and the description is sufficient to identify the land; the section being named, and the location with reference to lands of another being given.

4. *Appeal and Error; Review; Law of Case.*—Where the evidence on the second trial was the same as on the first, the determination of the Supreme Court on an appeal from the first trial must be followed on the second, the same being the law of the case.

5. *Same; Harmless Error.*—Where the legal evidence abundantly establishes plaintiff's case, errors in the admission of evidence were harmless.

APPEAL from Mobile Circuit Court.

Heard before Hon. SAMUEL B. BROWNE.

Ejectment by Caleb Toxey against H. W. Garrow and another. Judgment for plaintiff and defendants appeal. Affirmed.

See also 171 Ala. 644, 54 South. 556.

J. BLOCKER THORNTON, and BESTOR & YOUNG, for appellant. The mortgage from Wrag to Chandler did not cover the land in controversy, and the court erred in admitting it.—*Garrow v. Toxey*, 54 South. 556. The court erred in admitting parol and extrinsic evidence to vary

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and explain the description in the mortgage, as the ambiguity is patent.—*Chambers v. Ringstaff*, 69 Ala. 140; *Dane v. Glennon*, 72 Ala. 162; *Vance v. Lunsford*, 91 Ala. 576; *Donahue v. Johnson*, 128 Ala. 445. The Fulton map was expressly referred to in the Wrag-Chandler mortgage, was an ancient document, and was erroneously excluded.—*Bernstein v. Humes*, 75 Ala. 244; 5 Ballard on Real Property, § 309, et seq. The court erred in declining to give requested charges 2 and 3.—*Hoffman v. White*, 90 Ala. 354; *Howard v. State*, 108 Ala. 571; *Anniston C. L. Co. v. Edmonson*, 127 Ala. 460; *Henry v. Brown*, 143 Ala. 446.

GREGORY L. & H. T. SMITH, for appellee. The law of the case is thoroughly settled in the former appeal of *Garrow v. Toxey*, 171 Ala. 644. Under the peculiar wording, the title acquired by the quit claim deed was sufficient to carry an after acquired title in the grantor.—*Carter v. Doe*, 21 Ala. 90; 65 N. E. 896; 7 Greenl. 97. The title acquired from the government related back to the completion of the equity and vested in the cestui que trust.—§ 3408, Code 1907; *Price v. Dennis*, 159 Ala. 625. A man cannot complain of an error that does not *Barland, et al.*, 128 Ala. 418; *Scheuer v. Kelly*, 121 Ala. 647. A court will take judicial notice of the situation of lands according to governmental survey.—*Ledbetter v. Borland, et al.*, 128 Ala. 418; *Scheuer v. Kelly*, 121 Ala. 323; *Chambers v. Ringstaff*, 69 Ala. 140. A false description does not affect the deed if, after rejecting so much of it as is false, the land can still be identified.—13 Cyc. 626; 5th Ballard on Real Property, sec. 197; 2d Ballard on Real Property, sec. 165; 3rd Ballard on Real Property, sec. 219; *Heller v. Cohen*, 41 N. Y. Sup. 214; *Brookman v. Kurzman*, 94 N. Y. 272; *State Savings Bank v. Stewart*, 25 S. E. 543; *Clem, et al. v. Maloney*. 4

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Iowa 315; *Stout, et al. v. Bishop*, 35 N. J. Law 512; *Eggleston v. Bradford*, 10 Ohio 312; *Pegram v. Newman, et al.*, 54 Miss. 612; *Glenn v. Maloney*, 34 Iowa 314.

DE GRAFFENRIED, J.—The history of the title to the lands involved in this suit is of much interest. This history will be found in the opinion which was rendered by this court on the first appeal in this case.—See *Garrow v. Toxey*, 171 Ala. 644, 54 South. 556. The opinion on the first appeal gives the facts of this case and we will not restate them. On the first appeal this court held that the patent issued by the United States government to Audley H. Gazzam—under which appellee claims the land—is superior to the patent which was issued to Miguel Eslava. The appellants claim under the later patent, and also by adverse possession.

1. On the first appeal the record recited that a quitclaim deed was made by Gazzam to one George Wragg—through whom appellee claims—about three years prior to the date borne by the patent to Gazzam. On that subject this court, in the former opinion, said: “The deed itself is not set out. We are unable, therefore, without involving ourselves in a contradiction of the record, to consider what may have been the effect of any special covenants, which counsel in their brief say the so-called quitclaim contained. We think we must take the conveyance as a mere release or quitclaim. Nor does it appear that Gazzam was in possession at the time; and defendant took these points. Where one person makes a quitclaim to another, and afterwards obtains a patent for the same lands, the title of the patent does not inure to the grantee in the quitclaim, as it would in the case of a conveyance with warranty of title.—*Tillitson v. Kennedy*, 5 Ala. 407 [39 Am. Dec. 330]. On the case as it is made to appear to us as of the time when the quit-

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claim was received in evidence, there was error in overruling the objections taken to it."

In the present record the quitclaim from Guzzam to Wragg, referred to in the above-quoted language, is set out in full, and it contains the following stipulation: "Have remised, released and forever quitclaim, and by these presents do remise, release and forever quitclaim unto the said George Wragg in his full and actual possession now being and to his heirs and assigns forever, all the estates, right, title, interest, use, trust, property claim and demand whatsoever, at law as well as in expectancy of, in, to or out of all and singular those certain lots, etc."

This conveyance, by its terms, operated upon the present title and any future acquired title of Gazzam, and, when he obtained a patent to the lands from the United States government, the legal title which he thereby acquired vested in Wragg. This is made perfectly clear by the following other provision in said quitclaim deed; "So that neither the said Audley H. Gazzam, his heirs or assigns, nor any other person in trust for them or in their name or names or the name, right or stead of any of them, shall or will, can or may, by any ways or means whatsoever hereafter have, claim, challenge or demand any right, title, interest or estate of, in, to or out of the said premises above described and hereby released. But that he, the said Audley H. Gazzam, his heirs and assigns, each and every one of them from all estate, right, title, interest, property claim and demand whatsoever of, in, to or out of the said premises or any part thereof, is and shall be by these presents forever excluded and debarred."—*Tillotson v. Kennedy, supra*; *Garrow v. Toxey, supra*.

2. One of the links in the appellee's chain of title is a mortgage in which the lands are described as follows:

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"Also those certain lots or parcels of land situated in said county and being part of said Fulton tract of land. Said lots number one, two and three, containing ten acres each, commencing 25 chains and 25 links due east from the southwest corner of section No. 4 in township No. 5 south, and range 1 west, and running thence due south along the east side of the land belonging to F. C. Heard, 20 chains, thence due east 15 chains, thence due north 20 chains, to the north boundary line of said section No. 4, thence due west along the north boundary line of said section No. 4, 15 chains to the place of beginning, containing 30 acres."

The above, taken literally, is an impossible description. If the southwest corner of section No. 4 is taken as the starting point, then it is impossible for any of the land above described to be in section 4. If the northwest corner is the starting point—if the word "south" was, by a clerical error, written for "north"—then we have a perfectly harmonious description. There is one thing from which, by parol evidence, the true description can be made certain, and that is, the F. C. Heard land. The evidence shows without dispute that F. C. Heard owned land in section 4 which was the correct boundary of the land sued for if the word "northwest" is substituted for the word "southwest." In fact, this description shows that the lots which were intended to be conveyed and which were in fact conveyed by the above description were lots 1, 2, and 3, containing 30 acres in section 4, bounded on the west by the F. C. Heard lands, and it seems clear that it was competent for the plaintiff to remove all doubts about this description by parol testimony. There were but three lots in section 4, known as lots "1, 2, and 3, containing 30 acres," bounded on the west by the F. C. Heard lands, and on the north by the north line of section 4; and we think that, while the

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description shows that it is involved, it also shows that, by its own intrinsic evidence, properly aided by parol testimony, the description as it stands can be made certain. A description will not be declared void simply because of some defect or error in it, provided the description carries in it sufficient intrinsic certain evidence which, when aided by parol testimony, will resolve all reasonable doubt about the description. The appellants, it is true, offered a map which contained certain lots which are numbered 1, 2, and 3; but these lots are bounded on the west by Dog river, not by the Heard lands, and we cannot see how that map could have been of any value to the jury. The law seems to be that: "Where the ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is meant, the rule is inflexible that parol evidence cannot be admitted to supply the deficiency."—1 Ency. Ev. p. 830, note 8, and authorities there cited.

The above description shows plainly that only one piece of land could have been in the minds of the parties when the description was adopted, and that the piece of land was known as lots 1, 2, and 3, containing 30 acres in section 4, bounded on the west by the lands of F. C. Heard, and on the north by the north line of section 4. The dimensions of these lots are given, and, as it is patent that the word "southwest" is erroneously used in the description, we are clearly of the opinion that it was competent for the plaintiff, by parol testimony, to show exactly where lots 1, 2, and 3, containing 30 acres, bounded on the west by lands of F. C. Heard, and on the north by the north line of section 4, the three lots being 20 chains in length from north to south and 15 chains in width from east to west, were located.

"When the language is of such a character as to show that the parties had a fixed and definite meaning which

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they intended to express, and used language adequate to convey that idea to persons possessed of all the facts which they had in view at the time they used the language, it then becomes the duty of the court to learn those facts, if need be, by parol proof."—1 Ency. Ev. p. 831, note 10, and authorities there cited; *Bell v. Leggett*, 175 Ala. 443, 57 South. 836; *Heller v. Cohen*, 9 App. Div. 465, 41 N. Y. Supp. 214.

We are of the opinion that, aided by the parol testimony in this case, it is clear that the above description which we have copied from the mortgage is the same description as that which appears in the other muniments of plaintiff's title, viz.: "All and singular those certain lots or parcels of land situated, lying and being in Mobile county, and being part of the Fulton tract of land. Said lots numbered one, two, three, containing ten acres each. Commencing 25 chains and 70 links due east from the northwest corner of section No. 4, in township No. 5, in range 1 west, and running thence due south along the eastern boundary of the land belonging to Franklin C. Heard 20 chains; thence due east 15 chains; thence due north 20 chains to the northern boundary line of said section No. 4; thence due west along the northern boundary line of said section No. 4, 15 chains to the place of beginning."—*Bell v. Leggett*, *supra*; 1 Ency. Ev., *supra*; *Heller v. Cohen*, *supra*.

On the first appeal this court had before it the bald description contained in this mortgage, unaided by parol testimony. It therefore held, upon the recitals of that record, that the mortgage was not admissible. This record presents an entirely new question to us.—*Garrow v. Toxey*, *supra*.

3. In this case the defendants were in such a position that, to defeat the plaintiff's right of recovery, it was necessary for them to show that they or those through

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whom they claimed the land had, at some period, been in the adverse possession of the lands, claiming them as their own, for a period of ten years.

It is needless for us to here define adverse possession, or to say when a party has offered sufficient evidence of possession with accompanying acts of ownership, for ten consecutive years, so as to place that question within the province of a jury as an issue of fact for their determination. On the question of adverse possession the evidence in this record is substantially the same as it was in the record which was before us on the first appeal; and, speaking on that subject, this court, in the opinion on the former appeal, said: "Upon a careful reading of the record offered to that end, we are constrained to hold that there was no evidence, covering any uninterrupted period of ten years, which required that question to be submitted to the jury."

A careful examination of the evidence in this record leads us to the conclusion that the above-quoted declaration made by the court upon the former appeal should not be disturbed. That declaration was the law of this case upon the former appeal and is the law, as applied to the facts shown by the present record, on the particular point on the present appeal.

4. There are some exceptions to certain testimony which the trial judge admitted. Regardless of his rulings in this particular, upon all the legal evidence the plaintiff was entitled to recover. The plaintiff, upon legal testimony, made out his case, and, if there were errors committed by the trial judge in admitting some parts of the testimony, these errors were harmless as to the defendants.

The judgment of the court below is affirmed.

Affirmed.

MCCLELLAN, SOMERVILLE, and GARDNER, JJ., concur.

[Gustin v. Wilson.]

Gustin v. Wilson.*Detinue.*

(Decided November 7, 1914. 66 South. 461.)

1. *Detinue; Plaintiff's Ownership; Taxes; Possession as Agent.*—Where the action was detinue for certain staves, and defendant pleaded the general issue only, and plaintiff proved a conveyance of the timber on the land from which the staves had been cut, evidence that plaintiff had not paid for the timber conveyed by the deed, had not paid taxes on the land, and that defendant had sold the staves, prior to the bringing of the action, and was in possession merely as agent of the purchaser, was not within the issues, and was therefore inadmissible.

2. *Same; Possession; Denial; Estoppel.*—Where it was undisputed that defendant had manufactured and removed the staves from certain lands, the timber on which had been conveyed to plaintiff, and on a service of the writ of detinue for the staves, defendant gave a forthcoming bond, and instituted no claim in favor of the alleged purchaser prior to suit brought, he was estopped to deny that he was in possession of the staves at the commencement of the suit, and to claim that his possession was merely that of custodian or agent for his transferee.

APPEAL from Henry Circuit Court.

Heard before Hon. M. SOLLIE.

Detinue by H. K. Gustin against C. C. Wilson for certain staves. Judgment for defendant and plaintiff appeals. Reversed and remanded.

H. L. MARTIN and J. E. ACKER, for appellant. The deed offered conveyed the legal title to all the timber mentioned therein.—*Zimmerman v. Daffin*, 149 Ala. 380. A timber deed should be recorded.—*Milliken v. Faulk*, 111 Ala. 658. Defendant was a trespasser in the taking of the staves and the selling of them.—80 Ala. 230. Under the facts in this case, defendant was estopped from denying possession at the time suit was brought, and the court erred in refusing charges 1 to 40 requested by appellant. Plaintiff was entitled to the

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affirmative charge.—*Burns v. Campbell*, 71 Ala. 271; *Henderson v. Phelps*, 58 Ala. 590; *Street v. Nelson*, 80 Ala. 590.

W. L. LEE, for appellee. No brief reached the reporter.

MAYFIELD, J.—This is an action of detinue, by appellant, for several thousand oak staves. The sheriff executed the writ and made return, showing the seizure of the staves sued for. The defendant replevied the property by executing bond therefor, as authorized by the statutes. The trial was had on the general issue and resulted in verdict and judgment for the defendant, from which judgment plaintiff prosecutes this appeal, assigning 41 errors.

The plaintiff introduced timber deeds from various parties named in the complaint, conveying to him "all the merchantable long leaf pine and all other kinds of pine timber, cypress, cedar, poplar, gum, white oak, and all other kinds of oak timber, ash, hickory, and all other kinds of hardwood timber, and all other merchantable timber, and also all timber which may be merchantable at the time the timber is cut, as hereinafter provided, standing or growing upon those certain pieces or parcels of land," etc.

There was evidence tending to show that the staves sued for were made from the timber conveyed by these deeds, and that they were made and carried away by the defendant.

The defendant attempted to defend upon the grounds that the plaintiff had not paid for the timber conveyed by these deeds, and that he had not paid the taxes on the land, and that the defendant had sold the staves prior to the bringing of this action, and that defendant's possession was merely that of an agent of his vendee and not that of the owner.

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The court erred in allowing the defendant to make proof of these facts. Such evidence was not admissible under the issues and the undisputed facts of this case. If the staves were not the property of the plaintiff, and he was not entitled to possession when this suit was brought, he could not recover; and hence the evidence, tending to show that plaintiff had no title or right of possession, was admissible; but it was not permissible for this defendant to show that plaintiff had not paid the full purchase price of the timber, nor that he had failed to pay the taxes thereon, as neither fact showed or tended to show that he did not have title or right of possession, and neither tended to show any right or title of the defendant to the timber or the staves. Its only effect or tendency was to prejudice or bias the jury against the plaintiff. It was likewise a defense to the action to show, if the defendant could, that he was not in the possession of the staves when the suit was brought; but this he could not do, under the undisputed evidence in this case.

It was undisputed that the defendant manufactured and removed these staves, and that they were under his control, either as owner or as the agent or custodian of his own vendee, when the staves were seized by the sheriff under the writ of detinue, and he replevied them and gave a bond therefor as required by law. He then made no claim that the staves were the property of his vendee, and no claim suit was instituted, as might have been done if he was acting as the agent of his vendee, as he now claims he was. He was, therefore, by his acts and his bond, estopped from saying that he was not in the possession of the staves when they were levied upon by the sheriff. If he was not in possession, he thereby asserted that he was, and must take the consequence of his own voluntary acts and of the obligation assumed

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by the bond. Such was long ago decided by this court. The third headnote in the case of *Savage v. Russell & Co.*, 84 Ala. 103, 4 South. 235, correctly states the conclusion of the court in a case very similar to this. It is as follows: "Where defendant, in an action of detinue, has filed a forthcoming bond, and has claimed in a letter that the property was in his possession, and that he had notified plaintiffs before suit that, if they wanted the property, they would have to get it out of his possession by suit, he is estopped from setting up the defense that it was not in his possession at the institution of the suit."

The only plea in this case was the general issue, non detinet, that the defendant does not detain the goods; and when one claims this, as did the defendant in this case, and executes a forthcoming bond therefor, he thereby estops himself from denying that he was in possession of or claimed them; and it is wholly immaterial whether he claims as owner or as agent for a third person, so far as his possession is concerned. Of course he could in such case show title and right of possession in such third party, and defeat the plaintiff's right to recover; but he cannot screen himself by claiming that he was not in possession, but that the goods were in the possession of his vendee.

For these errors the judgment must be reversed and the cause remanded. It is wholly unnecessary to treat these errors seriatim. They are not so treated in the brief of appellant, but are grouped as we have treated them.

There are various objections and exceptions to different parts of the testimony, under each of the groups treated, and what we have said will be a sufficient guide on another trial.

[Henderson v. Planters & Merchants Bank.]

The many charges requested by appellant were **properly** refused; but we do not say that they would **have** been properly refused if the irrelevant evidence **had** been excluded, as it should have been.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ.,
concur.

Henderson v. Planters & Merchants Bank.

Supersedeas.

(Decided November 7, 1914. 66 South. 473.)

Appeal and Error; Finding; Conflicting Evidence.—Where the evidence was conflicting as to whether the sheriff had an execution in his hands at the time the payments were alleged to have been made to him, so as to bind defendant, a finding by the court in a supersedeas proceeding to quash an execution, that the execution was not in the hands of the sheriff at the time of the alleged payment to the sheriff, the sheriff having absconded, will not be set aside on appeal.

APPEAL from Coffee Circuit Court.

Heard before Hon. H. A. PEARCE.

Statutory supersedeas by J. E. Henderson against the Planters & Merchants Bank of Ozark. From a judgment dismissing the writ, petitioner appeals. Affirmed.

See, also, 178 Ala. 420, 59 South. 493.

RILEY & CARMICHAEL and W. W. SANDERS, for appellant. The verdict of the jury was clearly contrary to the great weight of the evidence, and did not support the verdict.—*Lynn v. McGowan*, 156 Ala. 462; *Carter v. Fulgham*, 134 Ala. 242. The verdict was contrary to the charge of the court.—*Wolf v. DeLage*, 150 Ala. 445.

[Henderson v. Planters & Merchants Bank.]

J. E. Z. RILEY, for appellee. It is a familiar principle that the appellate court will not disturb the finding of the trial court on conflicting evidence.—*Cobb v. Malone*, 92 Ala. 635, and cases following the same.

MAYFIELD, J.—This proceeding is a statutory supersedeas, a substitute for the common-law writ of *audita querela*, intended to prevent the abuse of judicial process. Appellant seeks to quash an execution issued out of the circuit court of Coffee county, against him and in favor of appellee, upon the ground or for the alleged reason that the execution had been paid. An issue was made up in the circuit court, based upon a written agreement, which authorized the jury to find if any one or all of the several disputed payments on the execution were made. These several payments aggregated \$1,628. The jury found that none of these disputed payments was made; and, if not made, it is conceded that the execution could not be quashed. It is also conceded that if all of these items had been paid as claimed, there would still remain due a balance on the execution, and it could not be quashed, but that it should be enforced only for the balance due. Appellant, defendant in execution, made a motion for a new trial, which was disallowed, and he appeals, assigning errors on the main trial, and also as to the denial of the motion for a new trial.

It would do no good to review or to discuss the evidence. Suffice it to say that it was in dispute and conflict as to each of the items of payment claimed to have been made. It was therefore a question of fact for the jury, under the agreement and the evidence, whether either or all of the payments claimed to have been made were actually made.

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This is the second appeal in this case. See 178 Ala. 420, 59 South. 493, where the subjects and questions involved were discussed at some length. There have been two trials of these issues—with the same result. On the former trial the court excluded all the evidence of the petitioner and directed a verdict, which we held to be reversible error. On this trial the questions were submitted to the jury, and they found against the petitioner.

If the evidence of the petitioner be true, the result of this proceeding wrought a great hardship upon him by requiring him to twice pay, in part, the judgment in this case. On the other hand, it is conceded that the amount in controversy has never been paid to the plaintiff in execution. It was paid to an absconding sheriff, who failed to account for it to either of the parties.

The real dispute is as to whether an execution issued, and was in the hands of the sheriff, when the payments were made to him, so as to authorize him to collect the unpaid balance of the judgment. The evidence is in dispute on this point; and, while we are doubtful as to the true facts in the case, we are not willing to disturb the finding of the jury, nor the action of the trial judge in refusing the affirmative charge, or in denying the motion for a new trial. It, therefore, follows that the judgment appealed from must be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

[Stollenwerck, et al. v. Marks & Gayle.]

Stollenwerck, et al. v. Marks & Gayle.

Bill to Declare a Deed a Mortgage and to Redeem.

(Decided June 4, 1914. Rehearing denied June 30, 1914.
65 South. 1024.)

1. *Mortgage; Deed as.*—The circumstances and contract considered and it is held that the transactions did not create a mortgage because the original purchaser was not indebted to the third person named in the deed.

2. *Same.*—Where there is no debt due from the grantor to the grantee in a deed absolute in form, the deed is not a mortgage.

3. *Same; What Are.*—In equity, a mortgage is a hypothecation or pledge of property as security for debt, and its effect is to leave the mortgagor personally liable for the debt, if, on foreclosure, the property fails to yield a sufficient sum to pay the debt in full.

4. *Same; Debt.*—The word "debt" in the definition of a mortgage means a duty or obligation to pay, for the enforcement of which an action will lie.

APPEAL from Montgomery City Court.

Heard before Hon. GASTON GUNTER.

Bill by Marks & Gayle against Frank Stollenwerck and others, revived in the name of his executors, to declare a deed a mortgage, to redeem, and for general relief. Decree for complainant and respondents appeal. Reversed and rendered.

The following is a copy of Exhibit B: State of Alabama, Montgomery County.

Whereas, W. M. Marks and W. A. Gayle have agreed to purchase from Abraham Bros. that certain lot in the city of Montgomery, Alabama, beginning on the west side of Lee street at a point one hundred and seven and one-half ($107\frac{1}{2}$) feet north of Tallapoosa street, running thence north along Lee street one hundred and seven and one-half ($107\frac{1}{2}$) feet, running thence west three hundred and six (306) feet, more or less, to Moulton street, running thence south along Moulton street

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one hundred and seven and one-half ($107\frac{1}{2}$) feet, running thence east and parallel with Tallapoosa street three hundred and six (306) feet, more or less, to the point of beginning, being a portion of lots three (3), four (4), seven (7), and eight (8), in square two (2), of East Alabama, upon which they have paid a portion of the purchase money, and for which they still owe said Abraham Bros. about the sum of thirty-four thousand dollars, upon the payment of which said Abraham Bros. have agreed and bound themselves to convey said property to said Marks and said Gayle by warranty deed, in fee simple, and the said Marks and said Gayle desiring Frank Stollenwerck to pay to said Abraham Bros. said sum of about thirty-four thousand dollars, to enable said Marks and said Gayle to obtain from them the said warranty deed to said property, and to pay to them, the said Marks & Gayle, the additional sum of about seven thousand dollars, making in all forty-one thousand dollars, in consideration of which the said Marks & Gayle propose to convey said property to said Frank Stollenwerck by warranty deed:

Now, therefore, it is mutually agreed and understood by and between said parties as follows:

1. The said Stollenwerck will pay to said Abraham Bros., on account of said Marks & Gayle, as hereinabove stated, on the 19th day of April, 1909, the said sum of about thirty-four thousand dollars, the exact amount to be ascertained from the said agreement between said parties, upon the delivery by said Abraham Bros. to said Marks & Gayle of a warranty deed conveying the above-described property to them in fee simple and free from incumbrances, and upon said Marks & Gayle delivering to said Stollenwerck a warranty deed conveying said property to him, said Stollenwerck, in fee simple and free from all incumbrances, to pay to said Marks &

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Gayle together the additional sum of about seven thousand dollars, making in all forty-one thousand dollars, on the 23d day of July, 1909, and for the payment of which the said Stollenwerck will give to the said Marks & Gayle his promissory note, payable on said date with interest from April 19, 1909.

2. Said Marks & Gayle hereby agree and bind themselves to execute and to cause to be executed by their respective wives a warranty deed conveying the above-described property to the said Stollenwerck, in fee simple, free from all incumbrances, for the consideration hereinabove expressed, and to deliver the same upon the payment by said Stollenwerck of said sum to said Abraham Bros., and the delivery to them or his said note as above stipulated.

3. Said Marks & Gayle agree and bind themselves to pay said Stollenwerck, or his heirs, interest at the rate of 8% per annum, payable annually, upon the said sum of forty-one thousand dollars from April 19, 1909, to the time of the receipt by the said Stollenwerck, or his heirs, of the consideration for said property, if it should be sold by him or them as hereinafter provided, but, if not sold, then for a period of three years from said date. In addition to said interest and for said term, said Marks & Gayle agree and bind themselves to pay to said Stollenwerck, or his heirs, all sums which he may pay out for taxes, street improvements assessments, fire insurance premiums, repairs, and other necessary expenses upon said property, but said Marks & Gayle shall have credit upon the amounts to be paid by them for such taxes, insurance premiums, repairs, and expenses, and as interest as aforesaid for the net amount of the rentals which said Stollenwerck may receive from said property during said period, settlements to be made on April 19 of each consecutive year. If payment of

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said sums of interest, taxes, insurance premiums, repairs and expenses is not made within thirty days after maturity, each year, all rights of said Marks & Gayle under this agreement shall at once cease and determine.

4. If said Stollenwerck, or his heirs, shall sell said property within three years from the date of the said conveyance to him, which shall be entirely at his option or desire, then he shall pay to Marks & Gayle one-half of the amount received by him therefor over and above the sum of forty-one thousand dollars.

5. Said Marks & Gayle further agree and bind themselves, if said Stollenwerck, or his heirs, should sell said property within said term of three years for less than forty-one thousand dollars, with the approval of said Marks & Gayle in writing, to pay to him, or them, immediately upon said sale being made, a sum equal to the difference between the net amount received by said Stollenwerck, or his heirs, for said property, and the sum of forty-one thousand dollars; but if said sale should be made without such approval for less than forty-one thousand dollars, said Marks & Gayle shall not be liable to pay such difference.

6. If said property should not be sold by said Stollenwerck, or his heirs, within said period of three years, then at the expiration of that period said Marks & Gayle may together, or either of them with the written consent of the other, or their heirs, within thirty days thereafter, repurchase said property from said Stollenwerck, or his heirs, at the price of sixty thousand dollars, but, if said Marks & Gayle, or either of them, does not within said thirty days so purchase said property from said Stollenwerck, then all rights of every kind and character belonging to said Marks & Gayle under this agreement or in reference to said property shall immediately cease and determine.

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In witness whereof said W. M. Marks, said W. A. Gayle, and said Frank Stollenwerck have hereunto set their hands and seals in duplicate this 10th day of April, 1909.

[Signed] Wm. M. Marks. [Seal.]

W. A. Gayle. [Seal.]

Frank Stollenwerck. [Seal.]

Witness as to W. M. Marks and W. A. Gayle :

[Signed] W. V. Taylor.

Witness as to Frank Stollenwerck :

[Signed] H. T. Bartlett.

The following is Exhibit C :

State of Alabama, Montgomery County.

For valuable considerations to each of the parties to this agreement from each of the others moving, the receipt of which is hereby mutually acknowledged, it is hereby mutually agreed between Frank Stollenwerck, W. M. Marks, and W. A. Gayle that that certain contract and agreement entered into by and between them and dated April 10, 1909, in reference to the property hereinafter referred to is hereby modified as follows :

1. Said Stollenwerck is hereby authorized and permitted to convey to the Louisville & Nashville Railroad Company the property described in said agreement, which is the same property conveyed to him by said Marks & Gayle by deed recorded in Deed Book 72, p. 302, in the office of judge of probate of said county, and to receive in payment therefor that certain property belonging to the Louisville & Nashville Railroad Company lying on the east side of Lee street in said city of Montgomery, north of the wholesale storehouse of Griel Bros. Co., south of the Louisville & Nashville Railroad Co. property and west of the alley running along the east side of said Griel Bros. Co. building, or so much thereof as he may accept therefor.

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2. It is understood and agreed that said property so accepted by the said Stollenwerck from said Louisville & Nashville Railroad Company and so conveyed to him by said company shall stand in lieu of the property described in said agreement of April 10, 1909, in all respects.

3. Said agreement of April 10, 1909, shall not be in any manner affected by said conveyance and this agreement, other than is herein expressly stipulated, but it is hereby agreed that the paragraph 6 of said agreement of April 10, 1909, is hereby changed so that the word "sixty" shall be changed to "eighty," so as to make the price at which said Marks & Gayle or either of them may repurchase said property "eighty thousand dollars" instead of sixty thousand dollars.

4. Said Stollenwerck having advanced to said W. A. Gayle as trustee the sum of three thousand dollars at the request of said Marks & Gayle, it is agreed that said sum, with interest at 8% per annum from the date of the payment thereof by said Stollenwerck shall be added to the amounts set forth and referred to in said agreement of April 10, 1909, to be taken into consideration in any settlement that may be made between the parties to said agreement according to the terms thereof.

In witness whereof, this agreement has been signed in duplicate by said parties this the 16th day of August, 1909.

W. M. Marks.

W. A. Gayle.

F. Stollenwerck.

Witness: Chas. D. Tallman.

BALL & SAMFORD and FRANK STOLLENWERCK, for appellant. Unless bound legally by the agreement of April 10, appellees owed Stollenwerck no debt.—*Hay-*

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nic v. Robinson, 58 Ala. 29. As to what is a mortgage and a debt secured, see *McKinstry v. Connolly*, 12 Ala. 678; *Peebles v. Stolla*, 57 Ala. 58. The facts show that no debt or mortgage was intended.—27 Cyc. 998; 66 Tex. 271; 2 Rob. 161; *Eiland v. Radford*, 7 Ala. 724; *Swift v. Swift*, 36 Ala. 217; *Douglass v. Moody*, 80 Ala. 61; *Mitchell v. Wellman*, 80 Ala. 16; *Vincent v. Walker*, 86 Ala. 333; *Thomas v. Livingston*, 155 Ala. 550. Inadequacy of consideration is not sufficient to convert an absolute conveyance into a mortgage.—Authorities supra. The bill was prematurely filed.—2 Jones on Mortgages, 1053. The following cases treat of the principles involved in this appeal.—*Eiland v. Raiford*, 7 Ala. 724-726; *McKinstry v. Conly*, 12 Ala. 678; *Robertson v. Farrelly*, 16 Ala. 472; *Murphy v. Barefield*, 27 Ala. 634; *West v. Hendrix*, 28 Ala. 226; *Parrish v. Gates*, 29 Ala. 256; *Swift v. Swift*, 36 Ala. 217; *Micou v. Ashurst*, 55 Ala. 607; *Peoples v. Stolla*, 57 Ala. 53; *Haynie v. Robertson*, 58 Ala. 37; *Turner v. Wilkinson*, 72 Ala. 366; *Mitchell v. Wellman*, 80 Ala. 19; *Douglas v. Moody*, 80 Ala. 289; *Daniels v. Lowery*, 92 Ala. 521; *Reeves v. Abercrombie*, 108 Ala. 540; *Smith v. Smith*, 153 Ala. 504; *Farrow v. Cotney*, 153 Ala. 550; *Rogers v. Burt*, 157 Ala. 91; *Whelan v. Toberner*, 71 Mo. App. 361.

MARKS & SAYRE and J. M. CHILTON, for appellee. The transaction in the case is either a conditional sale, or a mortgage. In doubtful cases the courts are inclined to hold a transaction a mortgage rather than a conditional sale.—*Love v. Palmer*, 26 Ala. 312; *Turnipsced v. Cunningham*, 16 Ala. 501; *Robertson v. Farrelly*, 16 Ala. 472; *Morrow v. Turney's Adm'r*, 35 Ala. 131; *Mobile B. & L. Ass'n*, 65 Ala. 388; *Cosby v. Buchanan*, 81 Ala. 575; *Daniels v. Lowery*, 92 Ala. 519; *Turner v. Wilkinson*, 72 Ala. 361; *Mobile B. & L. Assn. v. Robert-*

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son, 65 Ala. 388; *Glass v. Hieronymous*, 125 Ala. 140; *Rose v. Gandy*, 137 Ala. 329; *Reeves v. Abercrombie*, 108 Ala. 535; *Irvine v. Coleman*, 173 Ala. 175; *Shreve v. McGowan*, 143 Ala. 665; *Morton v. Allen*, 60 South. Rep. 866; *Nelson v. Wadsworth*, 61 South. Rep. 895; 2 Mayfield's Dig. 252-254; 1 Jones on Mortgages, 4th Ed. 246, 250, 251; 2 Pomeroy, Eq. Jur. (3d Ed.) 1193; *Conway's Exrs. v. Alexander*, 7 Cranch 329; *Brown v. Devey*, 1 Sandford's Ch. 71; *Russell v. Southard*, 12 How. (U. S.) 139; *Peugh v. Davis*, 96 U. S. (332) 337; *Cripp v. Jec*, 4 Brow. Ch. C. 472; *Hutzler Bros. v. Phillips*, 4 Am. St. Rep. 696. The fact that no note, or bond evidencing the debt, was given, is immaterial.—*Robinson v. Farrelly*, 16 Ala. 472; *Turnipsced v. Cunningham*, 16 Ala. 501; *Mobile B. & L. Assn. v. Robertson*, 65 Ala. 388; *Irvine v. Coleman*, 173 Ala. 175; *Shreve v. McGowan*, 143 Ala. 665; *Turner v. Wilkinson*, 72 Ala. 361; *Morton v. Allen*, 60 South. Rep. 866; *Nelson v. Wadsworth*, 61 South. Rep. 395; *Brown v. Devey*, 1 Sandford's Ch. 71; *Russell v. Southard*, 12 How. 139; *Peugh v. Davis*, 96 U. S. (332), 337; *Strilby v. Clinton Lumber Co.*, 1 Am. & Eng. Decis. in Eq. (note) p. 534. Interest is incident to a debt. Interest is the compensation which is paid by the borrower of money to the lender for its use.—Words & Phrases. Head Interest on Money, page 3706, and authorities cited. The continuous receipt by the grantor of rents accruing from the premises, and the payment by him of taxes, insurance and repairs would tend to indicate a mortgage, rather than a conditional sale.—*Reeves v. Abercrombie*, 108 Ala. (535) 540. The payment by one, at the request of another, of money, creates the relation of debtor and creditor between them, and the law implies the promise to pay.—*Irwin v. Coleman*, 173 Ala. 175; *Shreve v. McGowan*, 143 Ala. 665; 2 Mayfield's Dig. 252; 254; *Mobile B. &*

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L. Assn. v. Robertson, 65 Ala 388. The instrument not having any fixed day of payment, and the right to sell, or foreclose at any time, having been given to grantee, the reciprocal right of redemption at any time exists in the grantor. As the bill has reference to a single transaction, between the same parties, it is not multifarious. —See Code, § 3095.

ANDERSON, C. J.—A determination of this case is dependent largely, if not entirely, upon a construction of the contract marked Exhibit B to the bill of complaint as modified by a subsequent agreement marked Exhibit C to the said bill of complaint, and which will be set out by the reporter. As we construe Exhibit B, it created no debt from Marks & Gayle to Stollenwerck; there is nothing in it that obligates Marks & Gayle to pay Stollenwerck the sum paid out by him as the purchase price the property or to render them legally bound to him to pay the same or any part thereof. It seems that Marks & Gayle were unable to consummate the contract of purchase with Abraham Bros., except with the assistance of Stollenwerck, who financed the deal. The money was not borrowed from Stollenwerck, and there is nothing in the entire transaction which obligated Marks & Gayle as a partnership, or individually, to repay Stollenwerck the sum of \$41,000, the consideration paid by him for the property. The agreement simply authorized Stollenwerck to buy the property instead of Marks & Gayle, and to pay for same without being reimbursed or repaid by said Marks & Gayle, with the understanding that if Stollenwerck sold the property within three years for a profit the said profit was to be divided with said Marks & Gayle. It is true that Marks & Gayle obligated themselves to repay Stollenwerck the difference between \$41,000 and any less sum for which

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he should sell the property within three years at their request, but this was no unconditional promise on their part to guarantee the reimbursement of the said Stollenwerck, as he could not sell the property for less, except with their consent and approval, and if Stollenwerck did not sell the property within three years, which was entirely optional with him, the property was his, subject to the right of Marks & Gayle to repurchase same. Therefore there is nothing about the transaction which obligated Marks & Gayle to repay Stollenwerck the said \$41,000, or to convert the conveyance into a mortgage as a mere security for a debt owing from Marks & Gayle to Stollenwerck.

Had Stollenwerck sold the property during the three years for less than \$41,000 without the consent of Marks & Gayle, and which he had the right to do, they were not liable to him for the difference. Indeed they were not liable to him for any of said \$41,000, except in the one event that he sold the property during the said three years for less than said amount upon the written request of said Marks & Gayle. It may be true that Marks & Gayle obligated themselves to account for the difference between the net rent and the interest, taxes, paying, etc., during the said three years within which the property might be sold for the joint benefit of all the parties, but this was a mere condition to keeping the agreement alive, and was in no sense a debt to be secured by the agreements or for which the property was to be held as a security, as there was no provision for the unconditional payment or collection of same, the penalty for nonpayment being only a forfeiture of the right under the contract to share in the profits of a sale should same be made within said 3 years, or to re-purchase within 30 days after the expiration of said period in case no sale was made. Nor did the modification, Exhibit C,

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make the transaction a security or constitute the conveyance a mortgage; it merely added \$3,000 due by Gayle, as trustee, to the \$41,000 as the purchase price and which was to be included in the amount to be first deducted in case of a sale of the property before a division of the profits. There was nothing about the transaction to indicate that the said Stollenwerck would have any recourse on Marks & Gayle for the \$41,000 or the \$44,000, or that the conveyance should stand as a security for same. It was but a purchase by Stollenwerck of the property with the understanding that, if Marks & Gayle paid interest, taxes, pavement, etc., during the three years in excess of the net rents, Stollenwerck would divide the net profits with them in case of sale or let them repurchase the property for a certain price within 30 days if no sale was made, and, as a part of the consideration for the modified agreement and the exchange of the property and the increased amount for the repurchase, it was agreed that the \$3,000 due from Gayle, as trustee, should be added to the original consideration of \$41,000, subject to the terms and considerations of the original agreement. Marks & Gayle did not undertake to pay this \$3,000, nor did they owe Stollenwerck the original \$41,000; he simply paid that sum to become the purchaser instead of Marks & Gayle upon the condition that if they kept the interest, taxes, etc., within the rent during the three years he would divide the profits with them in case of a sale by him or that they might repurchase if no sale was made. The only condition whatever upon which Marks & Gayle should become liable for any part of the \$44,000 was in the event that Stollenwerck would at their request sell the property for less than said amount. They did not thereby become indebted to Stollenwerck so as to become personally liable to him for

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any residuum of the \$44,000, if upon a foreclosure the property did not yield a sum sufficient to pay the sum in full. The only possible theory upon which they could have become indebted was in the case Stollenwerck made a sale of the property at their request during the three years, but which was, even in that event, optional with Stollenwerck, and, this event never having happened, the said Marks & Gayle are not, and have never been, indebted to Stollenwerck for said sum so as to create the relation of debtor and creditor and which is essential to fix the status of mortgagor and mortgagee.

"One of the distinguishing tests by which to determine whether an instrument is a mortgage, or a sale with the privilege of repurchasing, is the existence or nonexistence of a debt to be secured. If there be no debt due from the grantor to the grantee, there can be no mortgage. The idea of a mortgage without a debt to be secured by it is a legal myth in our system of jurisprudence."—*Nelson v. Wadsworth*, 171 Ala. 603, 55 South. 120; *Vincent v. Walker*, 86 Ala. 336, 5 South. 465; *Douglas v. Moody*, 80 Ala. 61.

"A mortgage is, in equity, a hypothecation or pledge of property for the security of a debt. There must be a debt, or there can be no security for its payment. Hence it is said, if there is no debt, there can be no mortgage. Debt, in this connection, means a duty or obligation to pay, for the enforcement of which an action will lie."—*McKinstry v. Conly*, 12 Ala. 678; *Haynie v. Robertson*, 58 Ala. 37.

"It is a necessary ingredient in a mortgage that the mortgagee should have a remedy for his debt against the debtor. * * * The effect of a mortgage * * * is to leave on the mortgagor a personal liability for the residuum of the debt, if, on foreclosure, the property mortgaged fails to yield a sum sufficient to pay it in full."—*Peeples v. Stolla*, 57 Ala. 58.

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Applying this well-established rule to the case at bar, we hold that the city court erred in holding that the relationship of mortgagor and mortgagee existed between Stollenwerck and Marks & Gayle. Our conclusion can well be rested upon a proper construction of the written agreement above mentioned, but, should we have to look to the extraneous proof, the weight of same strengthens the theory that Stollenwerck was a conditional vendee, and not a mortgagee.

The decree of the city court is reversed, and one is here rendered holding that the conveyance in question was not intended as a mortgage, and denying the complainants the right to redeem the property, and, as the complainants were denied relief under the other theory of their bill and from which they took no appeal, the bill of complaint is dismissed.

Reversed and rendered.

MAYFIELD, SOMERVILLE, and DE GRAFFENRIED, JJ., concur.

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Bill to Rescind Contract of Purchase and to Annul Conveyance.

(Decided May 14, 1914. Rehearing denied June 30, 1914.
65 South. 986.)

1. *Pleading; Construction.*—Pleadings are no stronger than their weakest alternative averment, and will be so construed.

2. *Cancellation of Instrument; Bill; Sufficiency.*—A bill for the cancellation of a conveyance and the rescission of a contract of purchase of land, which, after alleging that respondents fraudulently misrepresented that the land sold extended to a public road, averred that respondents, prior to the conveyance, for the purpose of informing complainant as to their title, furnished an abstract with a plat of the land showing that the land extended up to and along the

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public road, or so very near thereto that thereby complainant was led to believe that the land to be conveyed extended to the public road, made out no case for equitable relief; since the alternative averment showed that complainant might have discovered the false representation.

3. *Vendor and Purchaser; Rescission; Time; Laches.*—Laches is grounded upon the assertion of adverse rights and unreasonable delay, to the prejudice of the adverse party, and acquiescence involves actual or imputable knowledge; hence, a complainant is not guilty of laches where, within eight months after discovering a false representation in a sale of land, it filed its bill for a cancellation of the conveyance and a rescission of the contract of purchase, the respondents' position having in no way changed except that one of the respondents had died in the interim.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by the Union Cemetery Company against R. T. Jackson and others to cancel a conveyance, and rescind a contract of purchase of land. From a decree sustaining respondents' demurrers to the bill, complainant appeals. Affirmed.

W. S. BURROWS, for appellant. The bill as last amended contained equity, and the demurrers thereto should have been overruled.—§§ 2469, 4298 and 4852, Code 1907; *Harris v. Carter*, 3 Stew. 236; *Camp v. Camp*, 2 Ala. 634; *Griggs v. Woodruff*, 14 Ala. 13; *Reid v. Walker*, 18 Ala. 326; *Lanie v. Hill*, 25 Ala. 554; *Foster v. Gressett*, 29 Ala. 395; *Kelly v. Allen*, 34 Ala. 672. Appellant is not guilty of laches.—*Mullen v. Walton*, 142 Ala. 171; *Haynie v. Legg*, 129 Ala. 623; *Harris v. Ivey*, 114 Ala. 364; *L. & N. v. Philyaur*, 94 Ala. 464, and authorities supra.

CARMICHAEL & WYNN, for appellee. The statements of the bill are too vague and indefinite.—*Land v. Cowan*, 19 Ala. 29; *S. & N. R. R. Co. v. Lancaster*, 62 Ala. 555; *Rapier v. Gulf C. P. Co.*, 64 Ala. 330. The appellant was guilty of negligence in buying the land.—70 Am.

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Dec. 406; 58 L. R. A. 804; *Juzan v. Toulmin*, 9 Ala. 663; *Carlisle v. Barker*, 57 Ala. 267; *Johnson v. Rogers*, 123 Ala. 579, and cases cited. Complainant is barred by laches.—2 Pom. § 853; *Lockwood v. Fitts*, 90 Ala. 150.

MCCLELLAN, J.—This amended bill, filed by appellant (a corporation) against appellees, seeks the rescission of a contract of purchase of land, the restoration of the parties to the status quo, and the cancellation of the conveyance made to the corporation. The other theory of the amended bill, which appellant would seem to assert as an alternative, contemplates a reformation of the conveyance. But this theory is rendered impossible of sanction by the averment of the amended bill whereby the absence of title in the grantors is affirmed. This appeal is from the decree sustaining demurrer to the bill as last amended.

The basis of complainant's claim for relief is misrepresentation in respect of one boundary of a plat of land containing one acre. Complainant was and is the proprietor of an area devoted to cemetery purposes. In order to improve the means of ingress and egress therefrom, the company desired to extend its holdings so as to afford a way into the burial ground from a nearby public road, which ran approximately 350 feet from the company's land. Dinkins, since deceased, and Jackson, Dinkins' brother-in-law, owned, as we must interpret the bill, an acre of land lying between the company's property and the public road to which the company desired to approach from its land. It is averred in the bill that, when fully advised of the company's purpose to secure approach to the public road, the grantors falsely represented, as a fact, that their property would, if purchased by the company, afford the desired means of way from the public road to the company's property;

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that the grantors' land extended from the cemetery property to the public road. It is further averred that the fact that the *acre* really owned by the grantors was under fence with an additional area that extended toward the public road contributed to emphasize the company's right to rely upon the aforesaid representations of the grantors; the company being ignorant in respect thereto. But these averments appear in the amended bill:

"And complainant further avers that at the time of the negotiations leading up to the making of said conveyance to it, or just prior thereto, and for the purpose of informing complainant as to their [grantors'] title in said tract, said Jackson and Dinkins furnished to complainant an abstract of title to said land with which a plat of said land was also exhibited and appended thereto, and was also furnished to complainant; and it avers that the said plat designated the said tract which was then about to be conveyed to complainant by them as being bounded by or extending up to and along the said public road on the east side of said road, or *so very near thereto* that by reason of the furnishing of said plat to complainant, and the said fence being along the eastern line or boundary of said road as aforesaid, and the statements contained in the said conveyance which was executed to complainant, and the representations therein contained, and the representations made to complainant by said Jackson and Dinkins at and prior to the time of said conveyance as aforesaid, that the land so conveyed, or which at that time was about to be conveyed, to complainant was bounded on the west side by a public road, the remaining of said fence along the boundary of said road as aforesaid, together with the fact that said land was undisturbed by any one claiming a title superior to the title of complainant or other-

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wise as aforesaid, all together lulled complainant into inactivity and the belief that further inquiry as to the true location of the western boundary line of the tract so conveyed was entirely unnecessary."

It is manifest that the alternative averment, which we have italicized, shows no more than that the plat, which was made for the particular purpose, and so accepted by complainant, of advising and informing the complainant of the western boundary of said Dinkins-Jackson plat, pictured that area as extending only *very near* to said public road, and by necessary implication negating any basis for conclusion that it *extended to* said public road. Pleadings are no stronger than their weakest alternative.—*Shahan v. Brown*, 179 Ala. 425, 60 South. 891, 895, 43 L. R. A. (N. S.) 792; *Jordan v. Ala. City Ry. Co.*, 179 Ala. 291, 60 South. 309, 311; *Osborne v. Ala. S. & W. Co.*, 135 Ala. 571, 33 South. 687.

The result is that the amended bill sets forth a case where the party complaining—with a view to equitable relief against a consummated contract—was afforded, before concluding the negotiations, ample and particular opportunity to ascertain and to know by mere inspection of a plat, furnished and accepted for the very purpose of informing the complaining party, that the false assertion upon which the complaining party claims to have relied and acted was untrue. So that the familiar doctrine which denies relief in equity because of false representations, where the real truth and fact was open to the unhindered observation of him who complains, or his ignorance (if so) is attributable to his negligent failure to use the means and opportunities in his power to ascertain the facts (*N. O. & Ala. C. & M. Co. v. Musgrove*, 90 Ala. 428, 7 South. 747; *Johnson v. Rogers*, 112 Ala. 576, 20 South. 929; *Crown v. Carriger*

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66 Ala. 590), has application here, and in consequence justified the chancellor in sustaining the demurrer. If it was the pleader's purpose to assert facts or circumstances whereby excuse could be accorded the company from deriving from the plat the information that the Dinkins-Jackson *acre* and the public road had no common boundary, the object was not attained by the averments quoted above. It appears therefrom that the abstract of title and the plat were made and furnished to the complainant for the particular purpose of informing it. According to the amended bill, the intervention, between the land of the vendors and the road, of an area not owned by the vendors was shown by the plat. If in connection with the circumstances averred, there was conflict between the representations of the vendors and the abstract and the plat exhibited therewith, manifest prudence required, if concluding negligence of the company was to be averted, that the company apply, by survey of the *single acre* to be purchased, the information within its hand.

Omitting account of other considerations that might justify the same conclusion on this appeal, the decree must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

ON REHEARING.

McCLELLAN, J.—While affirming the decree sustaining the demurrer to the bill as last amended upon the consideration stated in the opinion (ante) delivered as from the original submission, the *reason* leading the learned chancellor to the result effected by the decree, viz., laches, cannot be approved. According to the aver-

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ments of the bill as last amended, concluding laches cannot be imputed to the complainant.

Laches is founded upon acquiescence in the assertion of adverse rights and unreasonable delay, to the prejudice of the adverse party, on complainant's part in asserting the rights it would vindicate. Acquiescence involves actual or imputable knowledge. If a complainant is ignorant of the facts and of his rights, acquiescence and unreasonable delay cannot be appealed to to conclude him. In order to leave that effect, the complainant must have knowledge of the facts which entitle him to relief, and thereafter manifest a want of diligence in asserting his right.—*James v. James*, 55 Ala. 525; *Haney v. Legg*, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81.

It appears from the bill as last amended that the fact that the plat of land actually purchased did not extend to the public road, so as to afford a way therefrom into the complainant's property, as Dinkins and Jackson are averred to have represented, was not known to the complainant until, at most, eight months before this bill was filed to rescind the contract, and that, aside from the death of Dinkins, about fourteen months after the execution of the conveyance in question, "there has been no change of conditions" which would affect or embarrass the process of restoring the parties and the property to the status existing before the conveyance was executed. The averments of the bill as last amended render it impossible of a construction that would impute to the complainant a confirmation of the result of the fraudulent representations alleged, or that would justify the imputation that complainant did anything in respect of the conveyance or the property approaching, even, a waiver of the rights it would now assert, thus exempting the bill from the concluding doctrine stated in *Lockwood v. Fitts*, 90 Ala. 154, 155, 70 South. 467.

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According to the averments of the bill, there was no earlier assertion or interposition of claim by any one to the strip intervening between the *acre* really owned by Jackson and Dinkins and the public road; and only after a survey, made less than a year before this bill was filed, did it become known to complainant that the *acre* did not extend to the public road. Under the circumstances set forth in the bill, there was no *unreasonable* delay in seeking the relief sought by the bill by way of rescission.

The application for rehearing is denied.

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Bill for an Accounting.

(Decided May 21, 1914. 65 South. 1010.)

1. *Appeal and Error; Reference; Presumption.*—Where the appeal is from a decree overruling exceptions to the report of the register on matters of account, dependent on the register's conclusion from the evidence, all reasonable presumptions are indulged to support his rulings, and they will not be disturbed unless shown to be clearly wrong, based on erroneous conclusions of law, or illegal evidence, or on manifest error in weighing the testimony.

2. *Same.*—The findings of the register on conflicting evidence will be given the same weight as the finding of the jury, and will not be disturbed on appeal unless so palpably erroneous as would warrant the judge in setting aside the verdict under the same circumstances.

3. *Tenancy in Common; Account; Damages.*—A bill for an accounting between tenants in common does not present a case in which the damages should be assessed as if the parties were trespassers, wholly without right in converting the property; for where a tenant in common receives more than his share of the profits, as by the cutting down and selling of timber, he may not be treated as a tortfeasor by his co-tenants, but the remedy of the co-tenant is by an action on account or a bill in equity for an accounting; nor should harsh or excessive damages be awarded for failure to disclose facts necessary to ascertain the real damage.

4. *Same; Damages; Authority of Register.*—Where in an action between tenants in common, a register was appointed by the chan-

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cellor to ascertain the value of plaintiff's interests for timber cut and sold, and the register did not make any finding from the evidence as to the amount of timber actually cut and sold by the respondent, the register was not authorized or warranted in estimating damages solely by a comparison of the amount so cut and taken with the amount admitted by respondent to have been cut and taken from the land in the vicinity.

5. *Same; Evidence.*—Where the register made no finding as to the amount of timber actually cut and taken by respondent, the evidence would not support a finding as to the amount of timber respondents had removed, based on a comparison with the amount cut from another tract in the same vicinity.

6. *Same; Burden of Proof.*—On a bill filed by complainant against a co-tenant for an accounting for timber cut and sold, complainant had the burden of showing the amount and value of timber cut and removed by respondent.

7. *Same.*—Where the evidence for plaintiff attempting to establish the amount of damages for timber taken, first by counting and measuring the stumps on the land in questioning and estimating therefrom the timber taken, where the witnesses counted and marked the stumps on more than the land involved, and counted practically all the stumps, whether cut by respondent or during the three times the land had been previously cut over, and by guessing at the size of ramp seen stacked on or near the land, but which was not measured, it was too indefinite, uncertain and speculative to afford any basis for an estimate, much less for a finding as to the amount of timber cut and removed; the register having been appointed to ascertain the value of plaintiff's interest in the timber cut and removed by respondent, but making no finding as to the amount of timber taken.

8. *Same; Book Evidence.*—Where the only evidence which tended with any degree of certainty to show the amount of timber cut by respondents was that contained in the log book of respondent, which book was in no way discredited, such entries were sufficient to charge respondent with the amount of timber there shown to have been taken and removed.

9. *Same; Evidence.*—Where complainant offered no certain definite evidence as to the amount of timber cut and removed, a log book introduced by respondent purporting to show the amount cut and removed, amounted to an admission by respondent that he had removed the amount therein shown.

APPEAL from Butler Chancery Court.

Heard before Hon. L. D. GARDNER.

Bill by Louisa Crenshaw and others against the Gulf Red Cedar Company, for an accounting for complainants interest in certain timber cut and sold by respondent. From the decree rendered respondent appeals. Reversed and rendered.

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POWELL & HAMILTON and ADDISON L. HOLLADAY, for appellant. Counsel insist that as this is a bill between tenants in common for an accounting, complainant is held to that measure of damages in amount of their interest in the timber actually cut and taken, and that they cannot be held as tort feasers. They further insist that the only evidence in the record furnishing anything like a definite or clear or satisfactory basis upon which to estimate this damage is the log book kept by respondent and introduced in evidence. They insist that the decree should be corrected and made to conform to the amount shown by said log book, and that judgment should be rendered accordingly.

J. M. CHILTON and L. M. LANE, for appellee. There were no uncertainties in plaintiff's evidence.—*W. T. Adams M. Co. v. Southern S. L. Co.*, 56 South. 826; *Biglee F. Co. v. Scott*, 85 South. 56; 8 A. & E. Enc. of Law, 614; *Bufford v. Little*, 159 Ala. 300. The internal evidence, and the time required to haul four million pounds of logs discredits the log book introduced by respondents, beside, the log book was wholly inadmissible.—*Grant v. Cole*, 8 Ala. 517; *L. & N. v. Cassibry*, 109 Ala. 697; *Minniece v. Jeter*, 65 Ala. 225; *Snow Hdw. Co. v. Loreman*, 131 Ala. 222; *First N. Bank v. Chaffin*, 118 Ala. 246; *Smith's Leading Cas.* 621. The court will take cognizance of the familiar rule that all presumptions are indulged in favor of the finding of the register, and will not disturb them unless palpably erroneous.

MAYFIELD, J.—This is the fifth appeal in this case. See reports of former appeals, 131 Ala. 117, 30 South. 466, 90 Am. St. Rep. 22; 138 Ala. 134, 35 South. 50; 148 Ala. 343, 42 South. 564; 169 Ala. 606, 53 South. 812.

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The law and the equities governing this case, save as to a final accounting, were settled on former appeals. The parties are tenants in common of 640 acres of land, comprising the south halves of sections 7 and 8, township 11, range 13, in Butler county. The tract was therefore two miles in length, from east to west, and a half mile in breadth, from north to south. The suit is by the appellees against the appellant, for an accounting as between tenants in common. It is alleged, and the proof shows, that the respondent, appellant here, owned a one-fifth interest in this land, and that complainants (appellees) own the other four-fifths interest. It is alleged, and the proof shows, that the respondent has cut and removed large quantities of cedar timber from the lands in question, and has failed to account to the complainants for their interest therein, thus converting to its sole use the interest of complainants. This appeal is from a final decree adjudging that appellant pay to appellees \$29,660.96, such amount being the ascertained value of complainants' interest in the cedar timber used and converted by the respondent.

The sole contention or dispute between the parties on this appeal is the amount and value of the cedar timber removed from the lands in question; all other questions, except such as we shall hereafter refer to, have been either settled by agreement or determined on former appeals.

The decree ordering the reference was in part as follows: "It is further ordered, adjudged, and decreed that this cause be and is hereby referred to the register of this court, who will ascertain and report:

"(a) The amount and value of all cedar timber that was cut and removed by the defendant, the Gulf Red Cedar Company, through its contractors, agents, servants, or employees from the said S. ½ of section 7 and

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the S. $\frac{1}{2}$ of section 8, of township 11 and range 13, in Butler county, Ala., between the 18th day of December, 1888, and the 18th day of December, 1898.

“(b) The amount and value of all cedar timber that was cut and removed from said lands by said defendant, the Gulf Red Cedar Company, through its contractors, agents, servants, or employees between the 18th day of December, 1898, and the 6th day of August, 1900.

“(c) In ascertaining the value the register will estimate the value of said cedar timber after the same was cut down, and not as standing timber, but shall make no allowance for the expense of cutting the same.

“(d) The register will ascertain and report the amount due and owing by the defendant, the Gulf Red Cedar Company, as of the date of the reference to each of the complainants for their interests, respectively, in the value of said timber, each of the complainants, except Louisa Crenshaw and Lillian Wagner, being entitled to one-fifth of the ascertained value of all of the timber so cut and removed by the said defendant from said lands from the 18th day of December, 1888, to the 6th day of August, 1900, and the said Louisa Crenshaw and Lillian Wagner being respectively entitled to a one-fifth interest in the value of all the timber so cut and removed by said defendant from said lands from the 18th day of December, 1898, to the 6th day of August, 1900.”

The register, in response to this decree, reported as follows: “The register reports that a great deal of evidence was introduced as to the amount and value of the cedar timber cut by the Gulf Red Cedar Company from said lands, all of which he has considered, but from which he finds it difficult to form an accurate estimate of the quantity of cedar timber cut by the defendant from the T. C. Crenshaw lands; that it appears however,

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from the evidence, that on the 21st day of January, 1898, G. J. Peagler, Thomas W. Peagler, and Ellen D. Peagler sold and conveyed to the Gulf Red Cedar Company the cedar timber on a tract of land in the vicinity of the said T. C. Crenshaw lands for the sum of \$25,000, from which land the defendant admits that it obtained at least 19,000,000 pounds of cedar timber. After a consideration of all the evidence, the register finds that he can more nearly estimate the amount and value of the cedar timber cut by the defendant, Gulf Red Cedar Company, from said lands described in the decree by a comparison between the amount and value of said timber so cut from the T. C. Crenshaw lands with the amount and value of said timber sold by said Peaglers to the defendant company. After making allowances for the cedar timber cut from the T. C. Crenshaw lands before the purchase of the same by the Gulf Red Cedar Company, and confining himself to the cedar timber cut from said Crenshaw lands, the register reports that there was at least as much cedar timber cut and removed by the defendant, Gulf Red Cedar Company, from the Crenshaw lands as was obtained, as aforesaid, by defendant from the said Peagler lands.

"The register further reports that, taking the proven value of said Peagler timber at the sum of \$25,000, he finds that the Crenshaw timber was inferior in quality to said Peagler timber to the extent of at least one-fifth. He, therefore, finds and reports the value of the Crenshaw timber to have been as of the date of the filing of the bill in this cause, on the 6th day of August, 1900, to be the sum of \$20,000, and, deducting one-fifth share of said amount to which the defendant company is entitled under the decree, the register reports as the amount due the complainants of said sum of \$20,000, the sum of \$15,000 as of the date of the filing of said bill."

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This report was confirmed by decree of the chancellor. The bone of contention is the correctness of the register's report as to the amount of cedar timber taken from the lands by respondent.

On appeal from a decree of the chancellor, overruling exceptions to the report of the register in this case, on matters of account dependent upon the conclusions drawn by the register from the evidence produced before him, all reasonable presumptions are indulged to support his rulings, and they will not be disturbed, unless shown to be clearly wrong. Where the register, in his investigation, has the witnesses present before him, he has advantages, in weighing the testimony which neither the chancellor nor this court can enjoy; and his findings on controverted facts should not be disturbed unless based on erroneous conclusions of law, or on illegal evidence, or unless it is manifest that he erred in weighing the testimony.

Again, it has been said that where the evidence is conflicting the finding of the register has the same weight and effect as the finding of a jury, and will not be disturbed on appeal unless palpably erroneous, or unless it would warrant a judge in setting aside a verdict under similar circumstances.—*Winter v. Banks*, 72 Ala. 409; *Lehman v. Levy*, 69 Ala. 48; *Munden v. Bailey*, 70 Ala. 63; *McKenzie v. Matthews*, 153 Ala. 437, 44 South. 958; *Denman v. Payne*, 152 Ala. 342, 44 South. 635; *O'Kelley v. Clark*, 184 Ala. 391, 63 South. 948.

On account of this rule, the great mass of evidence has been carefully studied and analyzed; and we have reached the conclusion that the finding of the register as to the amount of cedar timber cut from the T. C. Crenshaw lands was incorrect.

This being a bill for an accounting between tenants in common, it is not a case in which the damages should

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be assessed as if the parties were trespassers and wholly without right in converting the property. The law in such cases was thus quoted in *Sanders v. Robertson*, 57 Ala. 471: "If a tenant in common receives more than his share of the profits, by an *excessive use of the property*, as by wearing out the land, or by an *improper use of it*, as by cutting down the timber and selling it, he cannot be treated as a tort-feasor, but the remedy of the cotenant is by an action of account, or a bill in equity for an accounting."

Neither do we think this a case in which harsh or excessive damages should be inflicted, because of the comingling of goods, or for the failure to disclose facts necessary to ascertain the real or true damages. We cannot agree with appellees that appellant has willfully or negligently withheld or concealed facts necessary to ascertain the damages. In fact the respondent has produced the only evidence from which the amount of the timber cut and removed can be estimated or ascertained with any degree of certainty. Moreover, it appears to us that the account was kept well and accurately, and that without it neither the register nor this court could ascertain the amount of the damages.

The report of the register states that he found it "difficult to form any accurate estimate" thereof. The report shows that he did not make any finding, from the evidence of the plaintiffs or of the defendant, as to the amount of timber actually cut or taken from the lands in question by the defendant, but that he reached his conclusion upon that fact purely and solely by a *comparison* of the amount so cut and taken, with the amount admitted by the defendant to have been cut and taken from the Peagler lands. This, we think, was unauthorized and unwarranted. There was no evidence which warranted the finding made, as to the amount of timber

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taken by defendant from the Crenshaw lands, though there might have been as to the *value* of the timber. There was no basis for the comparison which the register made between the amount of timber taken from the Crenshaw lands by the defendant and that admitted to have been taken from the Peagler lands. The evidence was undisputed that the Crenshaw lands had been three times cut over, before the defendant ever cut cedar therefrom; that all the merchantable square timber had been cut off the lands before the defendant entered same or cut timber therefrom; that there was no cedar timber thereon that could be used as merchantable square timber, when the defendant entered and cut the remainder, which was small and scrubby, and would not square 8 or 10 inches, the larger having been sold, cut, and carried off, before the defendant entered or cut therefrom. The Peagler lands, or parts thereof, were virgin forest, never having been cut over; and the evidence furnishes no basis for instituting the comparison which the register employed, as is shown by his report. The comparison was purely arbitrary on his part, as his report shows. He could just as well have said that the timber taken from the Crenshaw lands was two or three times as much as that taken from the Peagler lands. The evidence no more authorized or justified the finding that there was as much cut from the Crenshaw lands as from the Peagler lands than it authorized or justified the finding that there was twice or three times as much so cut. The register's finding was, of necessity, purely speculative or arbitrary, being unsupported by any tendency of any of the evidence. One of the witnesses, who instituted a comparison between the amounts of timber on the two tracts, did say that there was 10 times as much on the Crenshaw tract as there was on the Peagler tract, but that did not show, nor tend to show, that

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the defendant cut as much timber from the Crenshaw tract as it did from the Peagler tract. It is true the register says that he made due allowance for the timber cut from the Crenshaw land before the defendant purchased the timber or cut any thereof, and that he restricted his finding to the timber cut from the land by the defendant; and, so estimating, that he found that there was as much timber cut and removed by the defendant from the Crenshaw lands as there was from the Peagler lands. But there was no evidence to justify any such comparison or finding. While the register calls it a *comparison*, and we have spoken of it as such, it was really charging the defendant with the amount of timber taken from the Peagler lands. The amount taken from the Peagler lands was shown only by the logbook of defendant, without which there were no data from which to make an estimate. And if the logbook was correct as to the Peagler lands, why was it not, as to the T. C. Crenshaw lands?

The plaintiffs' evidence does not even tend to support the finding. It contradicts it in every particular. It shows, comparatively speaking, that there was 10 times more on the Crenshaw lands than there was on the Peagler lands; but this comparative evidence does not tend to show how much the defendant cut or removed from either tract. It relates solely to how much was originally and by nature spread on the two tracts, but not to how much was cut or removed therefrom by the defendant. So there was no evidence to justify or support a finding, by comparison, as to the amount of timber the defendant removed from the two tracts.

The testimony shows without dispute that the Peagler lands, or a part thereof, were of the finest timber lands in the country; while the lands here in question had been three times cut over, and all of the merchant-

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able square timber had been removed therefrom before the defendant ever entered thereon. The only timber growing on the Crenshaw lands when this defendant purchased, or entered upon the same was refused timber, scrubby, knotty, and of a very inferior grade; and in all this voluminous record there is no evidence which would justify a register or a court in instituting a comparison between the timber taken by the defendant from the Crenshaw lands and that taken from the Peagler lands. As to the finding in question, the register and the chancellor clearly erred.

The plaintiffs' evidence in this case satisfies us, as it evidently did the register, that it is too speculative, too uncertain, and too much of a mere guess to afford any basis for an estimate, much less a finding by a register or a jury, as to the amount of timber cut or removed by the defendant from the lands in question. If any theory of the plaintiffs' evidence is true, or if the estimate of any one of the plaintiffs' witnesses of the timber cut and removed is true, the decree in this case should be 10 times what it now is. We do not believe that plaintiffs' counsel will contend that a decree for the amount at which any one of the plaintiffs' witnesses estimated the amount of timber cut and removed by the defendant could or should be rendered. The register's report shows conclusively that he did not rely upon the plaintiffs' evidence as to the amount of timber cut or removed by the defendant from this land. In fact the plaintiffs' evidence is entirely too indefinite and uncertain to afford basis for even an estimate. The plaintiffs attempt to estimate the amount in two modes: First, by counting and measuring the stumps on the land in question, and then estimating the amount of timber taken by the defendant, from these data. The evidence indisputably shows that these data were wholly uncertain and unre-

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liable. It is reasonably certain from the evidence that the witnesses counted and measured the stumps on twice the amount of the land involved, and that they counted practically all the cedar stumps they found, whether cut by the defendant or by other persons. It was shown that the lands in question had been three times cut over before the defendant cut any timber therefrom, and that the last man who preceded the defendant in the cutting cut and sawed the stumps left by those who had preceded him, and the defendant may have done the same, that is, may have used the stumps left by those who preceded it. Consequently this method employed by plaintiffs to ascertain the amount of timber cut and removed by the defendant was wholly unreliable, and necessarily so, no matter how accurate the count or the measurement. The other mode by which the plaintiffs attempted to show the amount of timber was in merely guessing at the size of ramp which witnesses saw stacked upon and near the land. This was pure guesswork. The witnesses did not even attempt to measure the ramp, but guessed that it covered six acres, and was of a given height. This method is shown by all the evidence to be wholly unreliable; and as shown by the register's report, it was not considered by him.

The burden of proof was on the plaintiffs to show the amount of timber cut and removed by the defendant, and the value thereof. This they failed to sustain, unless the fact was shown by the defendant's evidence or by its answers to the interrogatories propounded by the plaintiffs which were in the nature of a bill of discovery. It is made certain by the register's report that it was this proof, produced by the defendant, that the register relied and acted upon in making his findings, both as to quantity of timber and as to its value. As we have

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shown above, there was no other evidence or reliable data upon which he could act. To have attempted to estimate the amount of timber by the evidence furnished by the plaintiffs' witnesses would have been nothing but wild guesswork, without proper information or data upon which to base the guess.

As we have heretofore shown, however, the register fell into error in attempting to ascertain the amount of timber cut and removed by the defendant from the lands in question *by the amount* it admitted it had cut and removed from the Peagler lands. There was no evidence or data, apparent by this record, which would justify this comparison, or the finding made by the register as to the amount of timber removed by the defendant from the Crenshaw lands. The only evidence to be found in this record which, with any degree of certainty, shows or tends to show the amount of timber cut and removed from the lands in question by the defendant is the evidence shown by defendant's logbook, and other admissions by it touching the subject of the inquiry. This book, we think, is shown to be as near accurate as could be expected under existing circumstances or from the nature of the business. And we find no evidence in this record to justify us in discrediting it. There is no evidence which we find that shows that the book was made or kept for the purpose of defeating this suit or the plaintiffs' claim for the timber taken from this land. It is possible that it is inaccurate in certain respects; but it is certain that it is the most reliable evidence, the best which the nature of the transactions and this record afford. It certainly amounts to an admission, on the part of the defendant, and justifies a decree for the amount of timber shown by this book to have been taken from the land in question.

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It is very true that the very nature of this suit and of the transactions involved renders it difficult, if not impossible, for the plaintiffs to know or prove the amount of timber cut and removed by the defendant from the land in question; but this fact would not justify the register or this court in arbitrarily charging the defendant with a fictitious amount, or in charging it with timber which was cut and removed from the lands long before it had any connection with the land, or even removed any timber therefrom. The defendant is properly chargeable with timber which it removed from the lands in question, or with the plaintiffs' interest therein; but it is not chargeable with timber which others cut and removed from the lands long before it purchased, cut, or removed any timber from the lands.

The decree of the chancellor, in so far as it confirms and adopts the report of the register as to the amount of timber cut and removed by the defendant from the T. C. Crenshaw lands, is erroneous, and is reversed; and a decree will be here rendered, charging the defendant with the amount of timber shown by its logbook, and admitted by defendant to have been removed from the lands in question, plus the \$60 worth of timber sold to Martin, which was not shown by the logbook.

The register should have found the amount of timber that was taken from the Crenshaw land as directed, and not the amount that was taken from the Peagler land. There is no evidence to support his finding that there was as much timber cut from the Crenshaw land by the defendant as was cut from the Peagler land. It is evident that the only way the register ascertained the amount of timber cut from the Peagler land was by referring to the logbook of the defendant. He should therefore have found the amount of timber taken from the Crenshaw land to have been 4,131,690 pounds, which

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was the amount shown by the logbook, and, estimating its price or value at \$1 per thousand pounds, would make the value of the timber taken by the defendant from the Crenshaw land \$4,131.69, plus the \$60 worth sold to Martin. Interest on this amount should be calculated from the 6th day of August, 1900, per agreement of counsel, which amount should be divided among the complainants in the same ratio as found by the report of the register, and decree will be here rendered for each of the complainants, for such amount so ascertained.

Reversed and rendered. All the Justices concur, except GARDNER, J., not sitting.

Rudolph v. City of Birmingham.

Bill to Remove Obstruction from Street.

(Decided June 3, 1914. Rehearing denied July 2, 1914.
65 South. 1006.)

1. *Municipal Corporations; Annexation and Merger; Effect on Pending Action.*—Under section 1159, Code 1907, where pending a suit by the city of Elyton, that city became a part of the city of Birmingham, the court properly ordered on motion that the suit proceed in the name of the city of Birmingham, although ordinarily the rule is that where the entire interest of the sole complainant in a suit passes to another by assignment or otherwise, the assignee claiming by a title that may be litigated must seek relief by an original bill in the nature of a supplemental bill, or by bill of revivor.

2. *Same; Streets.*—Where a city took a highway in territory incorporated into a city as it exists within law and fact at the time of such incorporation, its location in law and in fact was not affected by an encroachment thereon by an abutting owner.

3. *Statute; Construction; Retro-active Operation.*—While Acts 1889, now section 2899, et seq., Code 1896, was a curative statute, and provided among other things, a retrospective rule of evidence, yet its principal purpose was to prevent the sale of lots described by reference to maps or plats unless such maps or plats had been recorded, and as to this purpose, it was without retrospective operation.

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4. *Estoppel; Grounds; Recital*.—Owners of land who conveyed it by deeds describing it as bounded on a public highway, irrevocably recognized the highway as a public highway.

5. *Dedication; Evidence; Weight and Sufficiency*.—The evidence examined and held to show a dedication of such road as it then existed, prior to the erection of the obstruction therein by the then owner of the land.

6. *Same; Sale of Lots by Reference to Maps*.—Both at the present time and prior to the enactments of the Act which became section 3899, et seq., Code 1896, an owner who made a map or plat of land which spaces thereon indicating roads or streets, and sold lots with reference thereto, dedicated such spaces to the public, leaving them to be opened as streets or roads by the proper local authorities when the public interest required it and such dedication was irrevocable except by legislative enactment.

7. *Highways; Width; Establishment*.—Section 5768, Code 1907, does not forbid the establishment of roads more than thirty feet in width.

8. *Same; Authority of Commission*.—With reference to the establishment and change of public roads, the boards of county commissioners exercise a quasi legislative authority, which other tribunals will not revise or control, unless its action is productive of injury to or interferes with the property rights of individuals.

9. *Same; Record*.—Official action with reference to the location or change of public roads should be shown by the proper record of the boards of county commissioners.

10. *Same; Encroachments; Limitation*.—The acts of county authorities in suffering structures encroaching on a road to remain undisturbed many years, and in caring for the road as limited by such encroachments, did not estop them at any time from re-establishing the public right to the use of the road as defined by actual use prior to such encroachment; limitations do not run against the right of the public in highways, and a mere non-user of part of a highway for any length of time will not operate as an abandonment.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by the city of Birmingham against Z. T. Rudolph for mandatory injunction to require respondent to remove certain obstruction alleged to be maintained by him in a public road. Decree for complainant and respondent appeals. Affirmed.

HENRY UPSON SIMS, for appellant. The court erred in making an order substituting the city of Birmingham for the city of Elyton and letting the suit proceed in that name.—*Pitts v. Powledge*, 56 Ala. 147; Sims. Ch.

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§ 351. The Georgia road was not a public road as averred in the bill.—*Gadsden v. Williams*, 151 Ala. 592; *Cockran v. Purser*, 152 Ala. 354. Where land is described as bounded by the road, it goes to the center of the road.—*Evans v. S. & W. Ry. Co.*, 90 Ala. 54. Where the land across the road was not plotted, the ownership of the grantee goes across the road.—*Wes. Ry. v. Ala. Grand Trunk*, 96 Ala. 272; *Perry v. N. O. & M. Ry.*, 55 Ala. 424. The width of a road is thirty feet or less, and the statute governs.—*McDade v. State*, 95 Ala. 30; Malf. Dig. p. 786; § 1130, Code 1852.

ROMAINE BOYD, and M. M. ULLMAN, for appellee. A mapping and platting of lands, and the sale of lots amounts to a complete and irrevocable dedication of the lands thereon shown and delineated as public highways.—*Reed v. Birmingham*, 92 Ala. 339; *Webb v. Demopolis*, 95 Ala. 116. Where land is described as bounded by a road, it goes to the center of the road but subject to the public easement.—*Evans v. Savannah & W. Ry.*, 90 Ala. 54. By virtue of the statute in force the court properly permitted the case to proceed in the name of the city of Birmingham.—§ 1159, Code 1907. A public highway established by prescription or adverse user can only be abandoned in the method prescribed by the statute.—§ 5771, Code 1907.

SAYRE, J.—Originally the bill in this case was filed by the city of Elyton against appellant, and sought a decree requiring appellant to remove certain obstructions alleged to have been maintained by him in a public street of the complaining municipality known as the "Georgia Road." Some objections to the bill were disposed of in *Rudolph v. Elyton*, 161 Ala. 525, 50 South. 80. Pending a final decree the city of Elyton became a

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part of the city of Birmingham, after which the city of Birmingham moved the court to allow the cause to proceed in its name. It was so ordered, and appellant assigns the ruling for error. Ordinarily, if the entire interest of a sole complainant passes into another by assignment or otherwise, the benefit of the proceeding, when the assignee claims by a title that may be litigated, must be sought by an original bill in the nature of a supplemental bill or bill of revivor.—Sims' Chan. Pr. § 617. But the Municipal Code Law provided differently for cases of the kind here shown. Dealing with the subject of the annexation and merger of contiguous municipalities, the Code provides that: "All suits pending in any court on behalf of any city or town so absorbed, or whose government is extinguished, may be prosecuted or defended in the name of the city or town whose boundary lines shall be so altered or rearranged."—Code, § 1159.

This provision contemplates the uninterrupted prosecution of pending suits, and justified, required, the course adopted by the chancery court.

For more than 50 years the Georgia Road has been used by the public as a highway. We have no record of how or by whom or what authority it was originally laid out, but it may be inferred that it was located with a view to its practical coincidence with the township and section line. Whether it was intended to lie on both sides of that line, or wholly to the north of it, is uncertain, and, in our view of the case, immaterial, though the parties seem to attach some importance to the fact. That there has been such a road during this period is not denied. The difference between the parties relates to its northern boundary line. Prior to 1907, when it was incorporated into the city of Elyton, this road was worked and kept in repair by the county authorities,

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but, like many roads through rural districts, it was of irregular width and at places its boundary lines were illy defined. As some of the witnesses state the facts, the land along the road in that neighborhood was not very valuable, and was indiscriminately used by the public for convenience in passing and traveling, and no particular lines or limits were made except where it was cultivated. This much, however, is certain, that defendant's property right is limited on the south by the northern boundary of the road, wherever that of right must be located, and that for many years prior to 1889 a line between the road and the property now owned by defendant was quite distinctly located and defined as being at the place where it has been located by the chancellor's decree in this cause. As now defined by fences and other structures erected by property owners on either side, and as it has been used by the public since 1889, this road is more than 30 feet wide, and is now substantially as it was when incorporated into the city of Elyton.

Complainant (appellee) contends, as for one maintainable aspect of its case, that the evidence tending to show a long-continued adverse user by the public prior to 1889 is sufficient to establish as of that period an original dedication or prescriptive right in the public to a road with its northern limit at the point in question as it was then used and defined. This may be so, but, considering the facts already stated in connection with evidence to which we shall presently come, we prefer to place our conclusion upon a more specific act of dedication and its acceptance by the public.

In 1885 Margaret Walker owned the land to the north of the township or section line along which the Georgia Road ran. April 24, 1889, she conveyed to Elgin M. Thweatt land described as follows: "Commencing at a point on the south side of 2nd avenue north one hundred

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seventy-five (175) feet southwardly from the southwest corner of the intersection of 7th street and 2nd avenue north, thence southwardly and parallel with 7th street to the north side of the Georgia Road, thence westwardly along the north side of said Georgia Road to where the south side of 2nd avenue, north, intersects with the north side of said Georgia Road, thence eastwardly along the south side of 2nd avenue, north, to the point of beginning.”

By a like description Thweatt conveyed to J. E. Pauley May 11, 1901, and Pauley to defendant January 19, 1903. It is thus to be seen that defendant and his predecessors in title mentioned above have irrevocably recognized the Georgia Road as a public highway, and the only point of difficulty lies in the definite location of the northern limit of the road where it passes below or in front of defendant's property.

In 1889, and for many years before, the northern boundary of the roadway in actual use, where it passed along the front of the property now owned by defendant, and where also it approached a fork in the road a little to the west, veered to the north, away from the township or section line, and was apparently defined by a worm rail fence in the corners of which trees had grown to considerable size. Just outside of this fence, i. e., between the fence and the traveled roadway, there was a declivity of two or three feet, where the roots of the trees had been exposed by the washing and wearing away of the traveled surface of the road. Ordinarily passing vehicles went within 10 feet of the trees, unless the road was muddy, and then they went closer. Thweatt, during the time he owned the property, during the first year of his ownership probably, built the fence and the small houses complainant would now have removed, thus extending his inclosure some 10 or 20 feet to the south of the line

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marked by the worm fence and the trees. It is our opinion that in so doing he transgressed the limits of the property right he had acquired, and encroached upon a highway that had been dedicated to the public by his immediate predecessor in title.

The parties have agreed that defendant is "the owner of the land commonly known as lots 6, 7, and 8, and the W. $\frac{1}{2}$ of lot 5, in block 352, according to the map, plan, and survey of certain land situated in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 35, township 17 south, range 3 west, and known as the Margaret Walker addition to Birmingham, a description of said land as same was conveyed to respondent and to his predecessors in title, being as follows," to wit, the description used in the deeds to Thweatt and his successors. This agreement, and the description by which the property in question has passed from Margaret Walker down to defendant, make it entirely clear that defendant holds a title which depends for proof upon a map, plan, and survey of that part of S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 35 in which his property lies, showing the Georgia Road and other streets and avenues. In 1891 such a map and plat was made, acknowledged, and adopted by Margaret Walker, and recorded in the office of the judge of probate. With and as a part of this map was recorded a certificate as follows: "I hereby certify that the accompanying map is a correct and true plat and map according to a resurvey and a measurement made by me during the month of November, 1886, of the property of Miss Margaret Walker as it was then laid off, many of the lots having been sold according to said plan, as herein on said plat described, said survey being a subdivision into lots, streets, avenues, alleys and blocks as appear from said names of streets and avenues and measurings of same appearing thereon. Given under my hand this May 6, 1891. Jas. C. Long, Civil Engineer."

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In 1902, a similar map, known as the School Map of Margaret Walker's addition to Birmingham, was made, adopted, and recorded by R. H. Hagood, administrator of Margaret Walker, then deceased. These maps or plats, in and of themselves, did not circumscribe defendant's property by their implied dedication of the public streets and highways thereby shown, because Thweatt, who stood in the chain of title between Margaret Walker and defendant, had purchased before their recordation. However, they showed the Georgia Road, and that road, as it is there laid out, along with Second avenue and Seventh street, incloses a triangular space like unto the space inclosed by these ways as they now appear on the ground. The map of 1889, drawn to a larger scale than the map of 1891, shows a subdivision of the said triangular space into lots numbered 5, 6, 7, and 8, among others, these lots running through the space and fronting on both Second avenue and the Georgia Road. At that point also the northern limit of the Georgia Road shows on both these maps the same divergence from the township or section line as the worm fence with its growth of trees and its attingent and parallel declivity down to the traveled road, to which we have above referred. Evidently it was the intention of the owner of the property and the makers of these maps to recognize and perpetuate the Georgia Road as it was then and for many years had been marked and located by use on the surface of the ground, and evidently defendant and his predecessors back to Margaret Walker had purchased with reference to some such map, or with reference to the Georgia Road, Second avenue and Seventh street as these ways were at the time marked and located upon the surface of the ground by monuments or indications of property lines and boundaries, most likely with reference to both.

We have said that these maps in and of themselves

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did not bind Thweatt or defendant by the dedication of the Georgia Road shown thereon. But the certificates written upon the map and plat of 1891 indicate the fact that it was prepared and recorded in pursuance of section 6 of the act approved February 26, 1889 (Acts 1888-89, p. 53), section 3904 of the Code of 1896, section 6033 of the Code of 1907. This law provides that in cases where lands have been divided into lots prior to the 26th day of February, 1889, and the map or plat thereof lost or mislaid, and a part or all of the lots indicated therein have been sold, the owner thereof may cause a new survey to be made and a plat or map to be made therefrom, or reproduce the one lost, from survey already made, as required by section 2899 of the Code, certified, acknowledged, and recorded as therein required, and which shall have the same effect in all respects as plats or maps recorded under that section. The last-named section requires that a plat or map shall be made of lands divided into town lots. Section 3900 requires that such plats or maps shall be signed by the owner, acknowledged, and recorded, together with the certificate of the surveyor and of acknowledgment, after which they may be used in evidence to the same extent and with like effect as in the case of deeds. Section 3901 provides that the acknowledgment and recording shall be held to operate as a conveyance in fee simple of such portions of the premises as are intended for streets, alleyways, avenues, or other public use, and the same shall be held in trust for the uses and purposes indicated. The entire purpose and scheme of the statute discloses a clear implication that the provisions of sections 3900 and 3901 shall apply in the case of a new survey or the reproduction of a lost plat or map.

The act of 1888-89 was in fact a curative statute, and provided, among other things, a retrospective rule of evi-

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dence. The legislative competency to enact it, or the propriety of its invocation in this case, cannot be denied.—*Brannan v. Henry*, 175 Ala. 454, 57 South. 967. But the leading purpose of the act was to prevent the sales of land lots described by reference to maps or plats unless such maps or plats have been recorded. As to that, it had, of course, no retroactive effect. Before the act the law was that an owner who made a plat or map of land on which spaces were left indicating roads or streets, and sold lots with reference thereto, made his dedication of such spaces to the public conclusive, and left the streets or roads to be opened by the proper local authorities at such time as the public interest in their judgment might require.—*Western Ry. Co. v. Alabama Grand Trunk R. R. Co.*, 96 Ala. 272, 11 South. 483, 17 L. R. A. 474; *Elliott on Roads & Streets*, § 129. Such is also the law at this time, even though the map by which lots are sold is not recorded.—*Thomas v. Cowin*, 147 Ala. 478, 39 South. 898.

We are satisfied that the maps of 1891 and 1902 are substantial reproductions of the map of 1885, and the evidence of these maps and the coincidence of the location of the northern boundary of the Georgia Road as there shown with the actual location of the traveled road for many years before is ample to establish the fact that there was, prior to Thweatt's purchase, a dedication by Margaret Walker of the Georgia Road as shown by the maps, which became at that moment, or earlier, if there were earlier sales, irrevocable and indefectible save by legislative authority.—*Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *Reed v. Birmingham*, 92 Ala. 339, 9 South. 161; *Alabama Grand Trunk R. R. Co. v. Western Ry. Co.*, *supra*.

The evidence shows that during the period from 1891 to the incorporation of Elyton in 1907, the county au-

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thorities macadamized, worked, and cared for the Georgia Road as it was then and is now defined by the inclosure of defendant and other attingent owners. In connection with this fact defendant cites *Oliver v. Loftin*, 4 Ala. 240, in support of the proposition that there was an authoritative location and confirmation of the road within the limits so defined, and the fact that the road way as thus defined exceeds 30 feet in width is supposed to add force to this argument.

Since 1852 30 feet has been laid down by the statute as the width of a public road of the first class. Roads of the second and third classes are not so wide.—Code, § 5768. But there has never been any inhibition against roads of a greater width, and “the continuous course of decision from an early day has been that the court of county commissioners in reference to the establishment and change of public roads, exercises a quasi legislative authority, which other tribunals will not assume to revise or control, unless its action is productive of injury to, or interference with, the rights of property of individuals.”—*Commissioners’ Court v. Hearne*, 59 Ala. 371. Such is now in effect the declaration of the statute.—Code, § 5765. Official action in reference to the location or change of public roads should be shown by the proper record of the commissioners’ court. There is no record of any action by the court at any time in respect of the location or change of the road in question. The parol proof goes only to show that subsequent to the time of Thweatt’s encroachment, the county authorities suffered the encroaching structures to remain undisturbed, and cared for the road as thus defined until its incorporation into the city of Elyton.

Considering whether prescription or the statute of limitation should run against the rights of the public in rural roads, it is said, in *Elliott on Roads and Streets*,

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that: "There can, in principle, be no distinction between county roads and city streets, for in both cases the highways are held by the local organizations as governmental agencies. The truth is that the ownership of all highways, as highways, is in the state, and it is a departure from principle to apply the statute of limitations to highways, no matter what governmental corporation may have immediate control of them. In the local control of the highways we find the state acting through its agents, but never parting with the ultimate control nor with the proprietary right."—Volume 2, p. 769, note; *Idem*, § 488.

The rule of this court in regard to urban streets is stated in *Webb v. Demopolis*, and *Reed v. Birmingham*, *supra*, and other cases that might be cited. We think the same rule should obtain in case of rural roads.

It follows from what has been said that there was nothing in the statute classifying public rural roads, nor in the indulgence of the encroachment by Thweatt and his successors, to estop the county authorities at any time previous to the incorporation of the city of Elyton to re-establish the public right to the use of the road as it had been long defined by actual use prior to Thweatt's deed, which, on the other hand, estopped him and his successors to deny that right in the road as then used and defined.

In *McCain v. State*, 62 Ala. 138, where the corporate authorities of the town of Anniston were indicted for failing to keep in repair a certain road through territory which had been taken into town, it was said: "A town, created and incorporated as this was, out of rural territory, having, perchance, its public roads adapted to its wants and convenience as a rural community, cannot be bound by any principle of law to adopt and keep up, as a public street, every public road or highway that

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may have been in use before the change. Nor could a property holder, by dedicating a portion of his soil to the public as a street, compel the corporate authorities, against their consent, to adopt it and keep it up as a street, when the convenience of the public, or the growth and expansion of the town, did not call for such new street."

Defendant places some reliance upon the case. We are unable to see that it helps the defendant, for here the municipal authorities, so far from failing to discharge their public duty in the premises, are by this bill asserting the public right and insisting upon a restoration of the original boundaries of the Georgia Road as shown by its long use, and the plat of 1885, with reference to which, as the evidence goes to show, the defendant and his predecessors purchased.

"Roads and streets are frequently laid out or dedicated with reference to future requirements, as well as with reference to the existing condition of things, and it is not just to assume that because all of the way is not used by the public or by the abutter it has been abandoned."—2 Elliott, § 1175.

"Until the time arrives when any street or part of a street is required for actual public use, and when the public authorities may be properly called upon to open it for the public use, no mere nonuser, of any length of time, will operate as an abandonment of it, and all persons in possession of it will be presumed," as in favor of the public, whatever may be the rights of abutters, "to hold subject to the paramount right of the public."—*Reilly v. Racine*, 51 Wis. 526, 8 N. W. 417, quoted in note to section 1175, *supra*.

This is the doctrine of our cases.—*Webb v. Demopolis*, and *Reed v. Birmingham*, *supra*.

When the Georgia Road was incorporated into the city of Elyton, the municipality took it in its condition

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in fact and law existing at the time of its inclusion, as defendant insists. But its condition and location in law and fact were determined, not by the encroachment of defendant and his predecessors claiming under Margaret Walker, but by the long prior use of the road and the muniments under which they held, and these, as we feel constrained to hold, concurred in locating the road or street in question as it was located by the chancellor's decree. The decree must hence be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

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Bill to Redeem, and for an Accounting.

(Decided June 4, 1915. 85 South. 956.)

1. *Insane Persons; Mortgage; Validity.*—A mortgage by an insane person is absolutely void, and passes no title to the mortgagee.

2. *Quieting Title; Mortgage by Insane Persons; Legal Remedy.*—A mortgage by an insane person being absolutely void, a bill to have the same removed as a cloud on title, is without equity as complainant has an adequate remedy at law by ejectment.

3. *Mortgages; In Possession; Accounting.*—The right of a mortgagor to hold the mortgagee in possession to an accounting for rents and profits or waste, can only be enforced in equity although the rents are alleged to have been sufficient to satisfy the mortgage debt; the mortgagee being the legal owner of the estate, and his accountability for rents, etc., only an incident to the right to redeem in equity.

4. *Same; Bill to Redeem.*—The bill examined and held not to be a bill to set aside the second mortgage, but to redeem and to compel an accounting by the mortgagee in possession, and therefore, not demurrable.

APPEAL from Coosa Chancery Court.

Heard before Hon. W. W. WHITESIDE.

[Harris v. Jones, et al.]

Bill by T. N. Harris against E. V. Jones and others, to redeem from mortgage and for an accounting for rents and profits against the mortgagee in possession. From a decree sustaining demurrers and dismissing the bill, complainant appeals. Reversed and remanded.

H. A. DICKINSON, for appellant. The bill contained equity and the court erred in its decree sustaining demurrers and dismissing the bill.—27 Cyc. 1839; *High v. Hoffman*, 129 Ala. 359; *Field v. Clayton*, 117 Ala. 538; *American F. L. M. Co. v. Pollard*, 132 Ala.

FELIX L. SMITH, for appellee. If Mrs. Harris was non compos mentis the mortgage was absolutely void, and the complainant had an adequate remedy at law.—*Wilkerson v. Wilkerson*, 129 Ala. 279; *Patterson v. Simpson*, 147 Ala. 550.

DE GRAFFENRIED, J.—This is a bill to redeem the lands described in the bill from a mortgage or mortgages, and, as an incident to this main purpose of the bill, the complainant prays that respondents, who are in possession of the land, be required to account to the complainant for the rents, incomes, and profits which they have received, or by the exercise of reasonable care and diligence might have received, from the land since they became possessed of it, and also for waste which, the bill alleges, has been committed by the respondents upon the said land.

The rules which fix the liability of a mortgagee in possession to account to the mortgagor for rents, incomes, and profits and waste are fully set out and explained by this court in the case of *American Freehold Land Mortgage Co. v. Pollard*, 132 Ala. 155, 32 South. 630, and need not be here repeated.

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2. It appears from the allegations of this bill that Mary W. Harris, on September 25, 1897, executed and delivered to E. V. Jones, one of the respondents to the bill, upon the lands described in the bill, a mortgage to secure the payment of a note for \$100 due October 1, 1901. It further appears that said E. V. Jones transferred and assigned unto Julius Jones, the other respondent to the bill, a half interest in said note and mortgage. The bill further alleges that upon the execution of the mortgage the said E. V. Jones assumed possession of the said lands, and that since that time up to the filing of the bill the said E. V. Jones and Julius Jones have been in possession of the land, using the same, collecting the rents and income from the same, and that during said period they have committed divers acts of waste upon the same. The bill further alleges that *subsequent* to the execution of the above-mentioned mortgage, and prior to May 1, 1901, the said Mary W. Harris became *insane*, and that while she was thus insane, and for that reason incapable of binding herself or her property by any contract or conveyance, the said E. V. Jones delivered into her possession the above mortgage, and at the same time had her, to wit, on May 1, 1901, execute unto him another mortgage on said land to secure a note for \$200 due October 1, 1911. The bill further alleges that at the same time, to wit, on May 1, 1901, the said E. V. Jones had the said Mary W. Harris to execute and deliver to him a lease of the said lands, which lease by its terms expired on *December 31, 1911*.

A copy of this lease is attached to the bill, and in the lease it is recited that, in consideration of "one dollar paid by said E. V. Jones to said Mary W. Harris on this day, the said Mary W. Harris does hereby demise, lease, and farm let," etc., the lands described in the bill for

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a period of ten years to said E. V. Jones, the lease to terminate on December 31, 1911. The bill further alleges that between the execution of the first mortgage, in 1897, and October 14, 1911, the said E. V. Jones and Julius Jones, in rents, incomes, and profits obtained from said lands, received largely more than enough to fully pay off and discharge any lawful lien which they held upon said property by virtue of either one of the above mortgages, taxes paid by them, etc., but that nevertheless on October 14, 1911, the said E. V. Jones sold the said lands under the power contained in said mortgage to secure said note of \$200, and at said sale that the said Julius Jones bid the said lands in, and that since said sale the said E. V. Jones and Julius Jones have been in possession of the said lands, using the same, and collecting the rents, etc., for them.

3. The bill further shows that the said Mary W. Harris shortly after she executed the mortgage securing the \$100, and before she became *insane*, executed her last will. By this will she devised unto complainant, her son, all of her property, and made him the executor of the will. In this will she mentions expressly the said mortgage securing the note for \$100, and states that her said son had agreed to pay it. The bill shows that the said Mary W. Harris died in the insane asylum prior to the filing of the bill, and that her said will had been formally probated.

The complainant files this bill as *executor* and as *devisee*. In the bill he alleges that the mortgage securing the \$200 was void because of the insanity of the mortgagor, and alleges that the sale had thereunder was "fraudulent and void." He also alleges in the bill that the rents and profits arising from the lands and the waste committed by the respondents while in possession of the land amount to a sum in excess of the indebtedness se-

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cured by the mortgage securing the note for \$100 and any sum which the said E. V. Jones and Julius Jones may have expended for taxes or otherwise constituting a charge in their favor upon said land. The bill prays that the complainant be let in to redeem the land, asks for an accounting, alleges that the respondents are, upon a proper accounting, indebted to the estate of said Mary W. Harris; and in the bill the complainant submits himself to the court and "offers to do and perform whatever equity may deem just and right."

4. The bill, as already stated, shows that when it was filed the complainant was not in possession of the land, but that the respondents were in the actual possession of it. The chancellor, proceeding upon the theory that the mortgage securing the \$200 and the lease were *void because of the insanity* of Mary W. Harris at the time of their execution, dismissed the bill for want of equity. This court has frequently laid down the proposition that a deed executed by one who is non compos mentis "is absolutely void, and passes no title to the grantee therein," and that a bill filed for the purpose of having such a deed declared to be void on account of such insanity of the grantor, and canceled as a cloud upon the title, which shows that the complainant is not in possession of the land, but that the respondent is in possession, is without equity. In such a case the law affords a plain and adequate remedy through its action of ejectment, and there exists no necessity for equitable interposition.—*Wilkinson v. Wilkinson*, 129 Ala. 279, 30 South. 578; *Patterson v. Simpson*, 147 Ala. 550, 41 South. 842.

5. The present bill was not filed merely to have a mortgage and lease declared to be void, because of the insanity of their maker at the time of their execution, and to have them canceled as a cloud upon title. In this

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bill the validity of the first mortgage—the one securing the note for \$100—is recognized, and it is not claimed in the bill that Mrs. Harris ever made any payment to E. V. Jones and Julius Jones, its owners, on said mortgage debt. The bill shows that about the time of the execution of *that* mortgage the respondents went into possession of the lands, and that they have been in possession of them ever since. The complainant claims in his bill that the debt secured by said mortgage and all other lawful charges which, as mortgagees in possession, the respondents have upon said lands have been paid in one way only; i. e., by the rents, incomes, and profits received by the respondents from the land, and through the wasteful acts which respondents have committed upon the land to its damage, etc. The bill claims that the respondents, upon a proper accounting, are really indebted to complainant as the executor of the last will of Mrs. Harris; but this claimed indebtedness grows out of the alleged value of the rents, incomes, and profits which have come into the hands of respondents and the amount which, upon such accounting, should be allowed because of respondents alleged acts of waste. In other words, this bill is one to *redeem*, and the party who has filed it, standing as he does as executor of the will, and as sole devisee, in both of the shoes of the mortgagor, simply prays that the mortgagees in possession shall be made to account to him for the rents and incomes which they have received from the land, and for the amount of the damages which he has suffered through their acts of waste.

“The mortgagor’s right to hold the mortgagee to account for rents and profits of the mortgaged premises, or for waste done to them, *must* be enforced in *equity*, and not by suit at law. *Though the rents received may be sufficient to satisfy the debt in full, the only remedy*

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of the mortgagor is by a bill in equity for an account and redemption. He is not chargeable so long as the premises are not redeemed. He is the *legal owner* of the estate, and his *accountability* for rent is incident only to the *right in equity to redeem.*”—2 Jones on Mortgages (6th Ed.) p. 83, § 1116.

6. The bill in this case, it is true, alleges that, when the mortgage securing the \$200 note was executed, the said first mortgage was, contemporaneously with such execution, delivered up to Mrs. Harris; but the bill alleges that at that time Mrs. Harris *was insane*. The delivery of the first mortgage to Mrs. Harris, *while she was insane*, cannot aid the respondents in their efforts to escape accountability for the rents, incomes, and profits received by them from the lands, or for the waste which they have, since the execution of the first mortgage, committed upon the land. The complainant does not, as already stated, claim that Mrs. Harris ever paid the respondents a single dollar on the \$100 mortgage. On the contrary he claims that, if that mortgage has in fact been paid, the payment has been through the income, rents, and profits received by the respondents from the land, and through acts of waste which they have committed upon the land. This allegation of the bill—the question as to whether this mortgage has in fact thus been paid—can only be determined upon a proper accounting in a court of equity.—2 Jones on Mortgages, *supra*.

7. It is conceded, of course, that the mortgage securing the \$200 note, the ten-year lease, and the sale had under *that* mortgage are, if the allegations in the bill as to the insanity of Mrs. Harris are true, null and void. If Mrs. Harris was insane when the second mortgage and the lease were executed, then the respondents can claim no rights through them.

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8. There is nothing in the contention of the respondents that the complainant is not entitled to maintain this bill both in his capacity as executor of his mother's will and also as the sole devisee under the will. As executor he is certainly entitled to an accounting—if the allegations of the bill are true—and as devisee he is entitled to the land upon its redemption.—2 Jones on Mortgages (6th Ed.) p. 65, § 1098.

9. The decree of the court below is not in accordance with the above views. The decree of the court below is therefore reversed, and the cause remanded to the court below for further proceedings in accordance with this opinion.

Reversed and remanded.

ANDERSON, C. J., and MCCLELLAN and SAYRE, JJ.,
concur.

Harton v. Little, et al.

Bill to Rescind and Cancel a Deed.

(Decided May 21, 1914. Rehearing denied June 18, 1914.
65 South. 951.)

1. *Equity; Right to Relief; Clean Hands.*—It is sufficient to establish that complainant is not entitled to equitable relief because he does not come into equity with clean hands if it appears that complainant has been guilty of unscrupulous practice or overreaching, or has concealed important facts, though not actually fraudulent, or has been guilty of trickery, or taking undue advantage of his position, or unconscientious conduct.

2. *Same.*—The facts examined and it is held that although in the first instance complainant was under no duty to disclose his option, yet such duty devolved upon him when he became a quasi partner of defendant in the purchase, and not having performed his duty, was not entitled to equitable relief against respondent by virtue of the maxim that "he who comes into equity must come with clean hands."

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

[Harton v. Little, et al.]

Bill by H. M. Harton against W. M. Little and others, to rescind and cancel a deed to certain bonds, and to have a deed executed to complainant. Decree for respondents and complainants appeal. Affirmed.

See, also, in this connection *Harton v. Little*, 176 Ala 267, 57 South. 851; *Harton v. Enslen*, 176 Ala. 77, 57 South. 723; and *Empire R. Co. v. Harton*, 176 Ala. 99, 57 South. 763.

S. C. M. AMASON, for appellant. Counsel adopt practically the same brief as in the cases above set out.

FORNEY JOHNSTON and FRANK S. WHITE & SONS, for appellee. Counsel adopt practically the same brief as in the cases above set out.

GARDNER, J.—The demurrers to the bill as amended, which were sustained in the court below, seek to invoke (among others) the application of the principles embraced in the maxim, "He who comes into equity must come with clean hands."

In discussing the maxim, we can do no better than take a few excerpts from Mr. Pomeroy's excellent work (1 Eq. Jur. § 397 et seq.) wherein he says: "The maxim is sometimes expressed in the form, He that hath committed iniquity shall not have equity. Like the one described in the preceding section, it is not, in its ordinary operation and effect, the foundation and source of any equitable estate or interest, nor of any distinctive doctrine of the equity jurisprudence; it is rather a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief. Resembling the former maxim in this respect, it differs from that principle in some

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most important and essential features. In applying the maxim, 'He who seeks equity must do equity,' as a general rule regulating the action of courts, it is necessarily assumed that different equitable rights have arisen from the same subject-matter or transaction, some in favor of the plaintiff, and some of the defendant. * * *

The maxim does not assume that the plaintiff *has done* anything unconscientious or inequitable. * * *

On the other hand, the maxim, now under consideration, 'He who comes into equity must come with clean hands,' is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some relief, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy. The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence. * * *

Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that, while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act *upon the conscience* of a defendant and force him to do right and justice, it would never thus interfere on behalf of a

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plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of the parties, who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies."

The author then in the following section, by way of illustration, points out the effect of the above maxim upon cases involving specific performance, and shows that, although a contract may be perfectly valid and binding at law, and may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate, yet if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy.

"By virtue of this principle, a specific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious. * * * This application of the principle, better perhaps than any other, illustrates its full meaning and effect for it is assumed that the contract is not illegal, that no defense could be set up against it at law, and even that it possesses no features or incidents which could authorize a court of equity to set it aside and cancel it. Specific performance is

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refused simply because the plaintiff does not come into court with clean hands."

As is shown in the recent case of *Baird v. Howison*, 154 Ala. 366, 45 South. 670, this maxim includes within its operation several others, frequently acted upon in courts of equity, among them being the following: No action arises out of fraud or deceit; a right cannot arise to any one out of his own wrong. When both parties are equally in the wrong the defendant holds the stronger ground; and, as there quoted: "The fundamental reason upon which each of these maxims seems to rest is that a party does not come into court with clean hands to whose cause either of these maxims may be justly applied."

In *Glover, Adm'r, v. Walker*, 107 Ala. 540, 18 South. 251, quoting the case of *Williams v. Higgins*, 69 Ala. 523, we find the following: "Truth and fair dealing are rules of universal obligation. If men, in consummation of frauds, employ instruments, binding and conclusive in their legal operation and effect, it is sound reason, good policy, sheer justice, to leave them where they have placed themselves, bound as they have bound themselves, without assistance from the courts to unloose them, when it becomes their interest to be unloosed, encouraging them and others to commit similar fraud."

It is also made clear by the authorities that the principle is not invoked out of any regard or concern for the adverse party, but more in reproof to the plaintiff, and by way of punishment for the wrong and condemnation thereof by the court. This is better expressed in quotation found in *Baird v. Howison, supra*, as follows: "The principle or policy of the law, therefore, is to reject the suit of and reprove the plaintiff for his wrong—not to reward the defendant. The plaintiff must be punished, even though it may be at the expense of allow-

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ing the defendant, an equally guilty party, to obtain most unjust and unfair advantage for himself."

And in *Glover v. Walker, supra*, it is said: "It is held that, where the purpose of a grantor in the execution of a conveyance, absolute in form, is to place his property beyond the reach of creditors, to be held in trust for his own benefit, neither he nor his heirs can enforce the trust; not that such a conveyance gives the grantee an honest right to hold, but, because of the *vicious intent* (italics ours) of the grantor, he forfeits all right to enforce the trust."

It but remains to apply the principles above stated to the case in hand. We make no effort to here state all the material averments of the bill, but only call attention to a few which seem of most importance.

The complainant alleges that in January, 1900, he obtained an option on 150 acres of land located near Woodlawn, and which is now a part of the city of Birmingham, Ala., for purchase price of \$25 per acre; that soon thereafter he was introduced to one W. M. Little either by James F. Johnston or R. D. Johnston; that Little informed him of his desire to invest in real estate, whereupon complainant told him of the said land, but did not tell him he had an option thereon, and offered to sell Little same at \$50 per acre; that he took Little to see the land and said Little stated he did not want to go in debt and had only enough money to pay for one-half of it at the purchase price of \$50 per acre; that Little left Birmingham that day for North Carolina.

It is further averred that complainant then proposed to said Little that they go and see R. D. Johnston, and, if said Johnston would take a one-half interest in said land with him, then he (complainant) would do so; that they saw said R. D. Johnston, who declined to purchase one-half interest with Little; but that he (Johnston)

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said, if complainant would purchase the one-half interest in it with Little, that he would lend complainant \$500 to pay on the one-half interest, provided complainant would have the title to the one-half interest conveyed to him (R. D. Johnston) as security for the loan.

It is then alleged that W. M. Little and R. D. Johnston then agreed that complainant and Little should purchase the land, one-half interest each, and that it should be conveyed by deed to James F. Johnston, as trustee, for complainant and said Little. It appears that the conveyance was made accordingly; that Little paid his \$500 and subsequently paid the balance in cash, and that his payments paid in full for the land as the real purchase price to the owners was only \$25 per acre. Pursuant, however, to the understanding and agreement of the parties, R. D. Johnston gave complainant a check for \$500, which is alleged was a loan; but complainant did not use the check in making the purchase, and did not return it to R. D. Johnston, "leaving it among papers in reference to the purchase of said tract of land."

It thus appears that at the beginning of the negotiations complainant was to sell and at their conclusion he was (so far as Little knew or understood) a copurchaser with Little of said lands. Little had declined to buy as proposed by complainant; but he consented to buy *with* complainant, each acquiring a one-half interest. He knew nothing of the option. The check from Johnston to complainant appears to have been for the express purpose of deceiving Little, which check, it is alleged, was "left among the papers," neither used nor returned.

It is insisted that complainant was under no duty to disclose the fact of his option and the price. If it be conceded that he was under no such duty in the beginning of the negotiations, we do not think it helps complainant's case materially. When the whole matter was

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concluded, complainant was a *copurchaser* with Little. The latter so understood, and all that was done appears to have been with intent of keeping Little in the dark as to the true situation, and to deceive and mislead him.

For a court of equity to deny relief for misconduct on the part of complainant, it is not essential that the fraud or deceit be such as would be a defense to an action at law, or even that it should be such as would require a court of equity to cancel the contract, as appears from quotation herein quoted from section 400, Pom. Eq. Jur. vol. 1.

If he has nevertheless been guilty of unscrupulous practices, or overreaching, or has concealed important facts, even though not actually fraudulent, or been guilty of trickery, or taking undue advantage of his position, or other unconscientious conduct, then a court of equity may deny relief, although such may not constitute a defense at law.

The bill as much as confesses a willful premeditated deceit practiced on Little, whereby complainant, a copurchaser with Little, procures the latter to pay the full purchase price. As copurchasers they occupied a position akin to a quasi partnership, and, whether complainant, in the beginning, was under any duty to disclose the true situation or not, clearly when the latter relationship was formed, he was not in a position to perpetrate upon him a positive deceit. To grant the relief here sought would be to strike down the maxim, "No right of action arises out of fraud or deceit," and that other that "a right cannot arise to any one out of his own wrong." To so grant relief would be, at least by implication, to approve the conduct of the complainant, and this a court of equity cannot do. Speaking to that maxim, the Ohio Supreme Court, in case of *Kinner v. Lake Shore & M. S. Ry. Co.*, 69 Ohio St. 339, 69

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N. E. 614, says: "It denies all relief to a suitor, however well founded his claim to equitable relief may otherwise be, if, in granting the relief which he seeks, the court would be required, *by implication even*, to affirm the validity of an unlawful agreement, or *give its approval to inequitable conduct* on his part." (Italics ours.)

Whether such deceit be sufficient to avoid a contract either at law or in equity is immaterial. The evil motive, the trickery, the overreaching, the inequitable and unconscientious conduct are sufficient to preclude complainant from relief. It may be that some advanced ideas of a progressive age might condone such practices as "shrewd business"; but a court of equity is a court of conscience, demanding of those who seek relief at its hands just and equitable conduct, and recognizing truth and fair dealing as a rule of universal obligation, and whenever one has violated conscience or good faith and seeks its aid, then its doors are shut against him. It demands that "he who comes into equity must come with clean hands."

It has been held by this court, in *Baird v. Howison, supra*, that where a party resorts to equity to enforce a right growing out of a contract fraudulent and void, as to which the parties are in *pari delicto*, the court will deny the relief when the fraud is discovered from the evidence, *whether specially pleaded or not*.

Nor have we stated all of the inequitable conduct of complainant as shown by the bill. It is shown that R. D. Johnston proposed to complainant (this about two years after the purchase) that James F. Johnston convey a one-half interest in the land to Little and a one-half interest in the land to his wife, Lizzie Johnston; each deed reciting consideration of \$4,000. This was done November 19, 1901. Thereupon R. D. John-

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ston proposed to complainant that said Lizzie Johnston execute a deed to one-half interest in said land to complainant, and that complainant then executed a mortgage on same to Lizzie Johnston, purporting to be security for the purchase price of said one-half interest, in order to enable him (R. D. Johnston) to borrow some money to pay debts he owed. Complainant consented thereto. The deed was made to Lula Harton, wife of complainant, and recited consideration of \$5,000. The mortgage was then executed by Lula Harton and complainant, reciting a consideration of \$3,000. This mortgage afterwards fell into the hands of one Gilmore, was foreclosed, etc., and some of defendants seem to have acquired the title it purports to convey.

It thus appears that by consent and acquiescence of complainant the title was placed in his wife, and that he joined his wife in a mortgage reciting a consideration of \$3,000, which was fictitious and false, and this for the purpose of enabling Johnston to borrow money on the strength of the same. Again the evil intent, the fraudulent design, its present. But we do not think a further discussion necessary or profitable.

Complainant seeks the aid of a court of equity, and if, by his conduct as herein shown, he has placed himself outside the pale of truth and fair dealing in regard to this transaction, then it must be admitted that it is sound reason, good policy, and sheer justice to leave him where he has placed himself, "bound as he has bound himself, without assistance from the courts to unloose him."

We are not unmindful that the general principles of law herein stated have their limitations. They are noted and commented upon in *Phillips v. Bradford*, 147 Ala. 346, 41 South. 657, and in section 403, Pom. Eq. Jur. vol. 1. One of such limitations to the general rule is

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where the parties are not in *pari delicto*, as where a stronger mind takes advantage of a weaker, etc.

We are unable, however, to find in the record any room for application of any of these limitations. While the bill does show a confinement of complainant in the asylum for the insane, yet this did not occur until January, 1905, long after the above-stated transaction; and the bill further shows that he had never been afflicted with any mental disease, nor had there even been a taint of insanity in any of his ancestors or relatives. It would therefore appear from the bill that at the time of the transactions herein referred to complainant was in the vigor of physical and mental strength.

We are of the opinion that the demurrers to the bill as amended were properly sustained, and the decree of the chancellor is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ.,
concur.

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Mandamus.

(Decided May 12, 1914. Rehearing denied June 24, 1914.
65 South. 964.)

1. *Equity; Trial by Jury.*—In his discretion, the Chancellor may submit to a jury controverted issues of fact, and may empanel the jury himself or certify the questions to a law court for trial by jury.

2. *Same; Review; Jurisdiction of Equity.*—Where the Chancellor certifies to a law court questions for trial by jury, a party aggrieved by the verdict must have the particulars wherein he supposes himself injured on the trial in the law court certified by the presiding judge thereof to the chancery court, and make such certificate or certified exceptions the basis of a motion for relief before the Chancellor.

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3. *Same; New Trial.*—Where the Chancellor directs the trial of the issues of fact by the jury he must set aside the verdict and order a new trial; but the application for new trial must be made to him.

4. *Same; Issues.*—Where a court of chancery directs a suit at law the court of law has power to render judgment and settle all issues involved in the case, but this rule does not apply where only an issue is sent by the court of chancery to a law court for trial.

5. *Wills; Contest; Trial by Jury.*—Where the validity of a will is contested under section 6207, Code 1907, the Chancellor must, on seasonable demand, by either party, as a matter of right submit issues of fact to a jury as required by section 6209, Code 1907, and the jury may be empaneled by him, or he may direct the issues to a court of law for trial by jury.

6. *Same.*—Where a jury was regularly demanded in a suit to contest the validity of the will, and the Chancellor directed a trial of the issues by a jury in the court of law, the chancery court may award a new trial upon application properly made to it.

7. *Same.*—Where the issue *devisavit vel non* is tried by a jury and the verdict is made the basis of a final decree of the chancery court, on an appeal from such decree, the court will consider any exceptions properly reserved by bill of exceptions during the trial by jury.

8. *Appeal and Error; Questions Reviewable.*—An order of the Chancellor setting aside the verdict of the jury on issues submitted, demanded by a party to the proceedings and ordering a new trial, will not support an appeal.

9. *Same.*—The right to appeal from orders granting or refusing a new trial in civil cases is wholly statutory.

ORIGINAL petition in Supreme Court.

Petition by Mary O'Rourke Colvert to compel the chancery court of Jefferson county to vacate an order setting aside the verdict of a jury rendered in a will contest. Writ denied and petition dismissed.

GASTON & PETTUS, for appellant. The complainant is entitled to some relief, and if the order of the court is not a final decree which will support an appeal, then she is entitled to the alternate writ of mandamus.—*Bridgeport I. Co. v. Bridgeport L. Co.*, 104 Ala. 276. Mandamus is the proper remedy.—*Broyles v. Maddox*, 43 Ala. 357; *Ex parte Jones*, 55 South. 491. The verdict of the jury is not binding upon the chancellor.—*Matthews v. Forniss*, 91 Ala. 612. The proper practice in a

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case of this character is found in § 3201, Code 1907, elaborated by Judge STONE in *Adams v. Munter*, 74 Ala. 338. The jury trial in this case was ordered under § 6207 and 6209, Code 1907, as a matter of right upon the issue of devistavit vel non.—*Hill v. Barge*, 12 Ala. 693; *Adams v. Munter*, *supra*; *Rice v. Tobias*, 83 Ala. 348.

JOHN T. GLOVER, for appellee. The application for a new trial must be made to the court in which the case was tried, and in the circumstances of this case must be made to the chancery court and not to the law court.—16 Cyc. 426; 29 Cyc. 922; 101 U. S. 247; *Alexander v. Alexander*, 5 Ala. 517.

DE GRAFFENRIED, J.—This is an original application to this court for a writ of mandamus addressed to the chancery court of Jefferson county ordering said court to vacate an order of said court setting aside the verdict of a jury.

The facts, in short, are the following: An instrument, purporting to be the last will and testament of W. R. O'Rourke was duly probated in the probate court of Jefferson county, Ala. Within a year after that period a bill of complaint was, under the provisions of section 6207 of the Code of 1907, filed in the chancery court of Jefferson county to contest the validity of the will. When the bill was filed a trial of the issue devisavit vel non by a jury was regularly demanded. The chancery court made an order that this issue should be tried by a jury in a court of law, which was done. The jury which tried the issue in the law court returned a verdict invalidating the will. During the progress of the trial in the law court the respondents to the bill reserved a bill of exceptions wherein they set forth the

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particulars in which they felt themselves injured by the rulings had upon that trial. This bill of exceptions was filed in the chancery court, and was made the basis, by the respondents, of a motion filed in the chancery court to award them a new trial. The chancellor granted the motion for a new trial, and this proceeding is had for the purpose of requiring the chancellor to vacate the order granting the new trial and to render a decree following the verdict invalidating the will. The sole question, then, is: Did the chancellor have the power to set aside the verdict and order another trial of the issue *devisavit vel non* by a jury? This question has never been determined by this court, and is not free from difficulty.

1. It is, of course, a familiar proposition that on doubtful or controverted issues of fact the chancellor, without regard to any of our statutes, may, in his discretion, call for the verdict of a jury. In such case he may himself impanel the jury or he may certify the questions about which there is doubt or conflict to a law court to be tried by a jury.—*Adams v. Munter & Bro.*, 74 Ala. 338.

In all such cases, undoubtedly, the proper practice is for the aggrieved party to have the particular wherein he supposes himself injured on the trial in the law court certified by the presiding judge of such law court to the chancery court and to make "that certificate, or the certified exceptions, the basis of a motion for relief before the chancellor."—*Adams v. Munter & Bro.*, *supra*.

In such a case the chancellor certainly has the power to set aside the verdict of the jury and to order a new trial of the issues.—*Adams v. Munter & Bro.*, *supra*.

If either party is dissatisfied with the verdict, an application should be made for a new trial, "not to the court in which the issue is tried, but the court of chan-

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cery in which the cause is pending.”—*Alexander v. Alexander*, 5 Ala. 517.

2. When the validity of a will is contested in chancery under the provisions of section 6207 of the Code of 1907, then, under the construction which this court has placed upon section 6209 of said Code, a trial by jury, upon seasonable demand of either of the parties for a trial of the issue *devisavit vel non* by a jury, becomes a matter of right.—*Mathews v. Forniss*, 91 Ala. 157, 8 South. 661; *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810.

In such a case the chancellor, as in all other cases in which he submits an issue of fact to the determination of a jury, may impanel a jury and have the issue determined in his own court, or he may direct the issue to be tried by a jury in a court of law.—Code, 1907, § 6209.

It would seem, therefore, that the same rules of procedure must govern every case in which the trial by jury is had of doubtful or controverted issues of fact arising in a suit in chancery regardless of the question as to whether the chancellor has a *discretion* as to ordering a jury trial or whether he is without discretion in so ordering it. Our statutes on the subject now under consideration were adopted in the light of the above rules of chancery governing the trial by jury of disputed and doubtful issues of fact, and in the light of those rules those statutes must be construed. In so far as the law court in which, under the direction of the chancery court, the issue *devisavit vel non* is tried is concerned, we find nothing in any of our statutes which confers upon it any power whatever as to granting of a new trial, nor do we find that any of our statutes have conferred upon a law court trying such an issue any more authority or power over a verdict rendered upon such an issue than it possesses over any other verdict render-

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ed by one of its juries upon any other question of disputed fact certified to it for trial by a court of chancery. "If either party is dissatisfied with the verdict an application [for a new trial] should be made, *not* to the court in which the issue is *tried*, but to the court of chancery in which the cause is pending," was a general rule governing *all* jury trials of issue of fact in chancery cases long before any of our statutes on the subject now under consideration were enacted, and we see no way of escaping the proposition that, in the instant case, the application for a new trial was properly made to the chancery court, and that it is certainly within the power of the chancery court to award new trial in such cases.—*Alexander v. Alexander, supra*, and cases therein cited.

3. In the present case the order of the chancellor setting aside the verdict and ordering a new trial was an interlocutory order, and his action in the premises certainly at this stage of the proceedings presents nothing to us for review. When a final decree is rendered in the cause the bill of exceptions upon which the chancellor awarded the new trial will form a part of the record, and, if an appeal is then taken from such final decree, the question will then be presented to this court as to whether this court has jurisdiction to review the ruling of the chancellor in that regard.—*Alexander v. Alexander, supra*.

It does not follow that one who is entitled to a trial by jury as a matter of right is entitled to appeal from an order setting aside the verdict of a jury in his favor.—*Selby Iron Co. v. Cobb & Lewis*, 55 Ala. 636.

The appeals which are entertained by this court from orders granting or refusing to grant new trials in civil cases in actions at law are of statutory creation.—*Johnson v. State*, 87 Ala. 39, 6 South. 400.

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Of course, when the issue *devisavit vel non* is tried by a jury and the verdict of the jury is made the basis of a final decree of the chancery court, then this court, upon appeal from such decree, will consider any exceptions which were properly reserved by bill of exceptions during the trial of the issue by the jury.—*Mathews v. Forniss, supra; McCutchen v. Loggins, supra.*

4. A simple illustration will, we think, make plain the integrity of the above conclusions: Suppose, when the bill in the instant case was filed, *no* demand for a trial of the issue *devisavit vel non* had been, within the time prescribed by law, made by either party. In that event, while a trial by jury of the issue *devisavit vel non* would not have been a matter of *right* in either party, *nevertheless* the chancellor, by virtue of the power inherent in the chancery court, could have ordered a trial by jury of this *very issue and in the identical court in which it was, in fact, tried.* In that event beyond doubt the *chancellor* and the *chancellor only*, would have possessed the power to set aside the verdict and order a new trial.—*Alexander v. Alexander, supra; Adams v. Munter & Bro., supra.* Certainly the mere fact that the jury trial, because it was seasonably demanded, rested in the party demanding it as *matter of right*, instead of in the discretion of the chancellor, cannot alter the procedure necessary to a *proper* and *legal* ascertainment by a jury of the issue. Under the system of English jurisprudence the right to set aside the verdict of a jury in all civil matters has always resided somewhere. The power to set aside the verdict of a jury called upon to try a controverted and doubtful issue of fact certified by a chancellor to a law court for trial never did reside in the judge of the law court, but always resided in the chancellor before whom the cause was pending.—*Alexander v. Alexander, supra.*

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Our statutes, as already stated, give our law judge no more authority over the verdict of a jury trying the issue "devisavit vel non" when certified by a chancellor for trial by a jury than over the verdict of a jury which may try any other controverted and doubtful issue of fact properly certified by a chancellor for trial, and the conclusion seems to be irresistible that the chancellor, and the chancellor only, may, when the question is brought properly before him, set aside the verdict of a jury which has upon his certification to a law court tried the issue *devisavit vel non*, whether that jury trial was or was not a matter of right in the parties to the cause.—*Alexander v. Alexander, supra*; Daniells, Chancery Practice (6th Am. Ed.) pp. 1120-1135.

5. It sometimes happens that a court of chancery directs a suit at law, as for instance an action of ejectment, to be brought and tried. In such a case the court of law has power to render *judgment* and thus settle *all* the issues involved in the *case* so brought. In such a case the court of law is the proper forum to pass upon the question as to whether the verdict of the jury shall or shall not be set aside. This is *never* true, however, where an *issue*—as in this case—is sent to a law court for trial.—Daniells, Chancery Practice (6th Am. Ed.) p. 1135, n. 10.

6. It follows from what we have above said that, in our opinion, the petitioner is not entitled to the writ of mandamus prayed for, and the petition is dismissed.

Mandamus denied, and petition dismissed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ.
concur.

[Kyser v. Hertzler.]

Kyser v. Hertzler.*Bill to Abate Private Nuisance.*

(Decided June 11, 1914. 65 South. 967.)

1. *Nuisance; Private; What Constitutes.*—Although a private stable per se is not a nuisance, it may become so by reason of the manner in which it is constructed, kept or used, or by reason of the location being improper or necessarily injurious to a neighbor.

2. *Same.*—A private stable emitting offensive odors, located about thirty feet from the front of plaintiff's residence, is a private nuisance which equity will abate.

3. *Same; Abatement and Jurisdiction.*—Section 718, Code 1907, confers a concurrent and cumulative, but not an adequate remedy, and does not affect the original jurisdiction of equity to abate nuisance.

4. *Evidence; Judicial Knowledge.*—The courts will not take judicial notice that the offensive odors emitted from a stable contain ammonia, and are "supposed to be more or less healthful."

5. *Injunction; Temporary; Dissolution.*—Under section 4353, Code 1907, the rule is modified, and an injunction will not be dissolved necessarily merely because the answer denies the material averments of the bill.

6. *Same.*—The fact that a nuisance was dissolved in obedience to a temporary injunction should not be considered on a motion to dissolve such injunction.

APPEAL from Madison Law and Equity Court.**Heard before Hon. J. H. BALLENTINE.**

Bill by Frank Hertzler against J. A. Kyser to enjoin the maintenance of a private nuisance. From an order overruling the motion to dissolve a temporary injunction, respondents appeals. **Affirmed.**

BETTS & BETTS and **LANIER & PRIDE**, for appellant. The bill was without equity and the injunction was improperly issued.—*St. James Church v. Arrington*, 36 Ala. 548. Attention is called to the health officer's affidavit, and to the case of *Gallagher v. Floury*, 57 Atl. 672. The temporary injunction should be dissolved on

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the sworn denials of the answer.—*Turner v. Stevens*, 106 Ala. 548; 22 Cyc. 40. An injunction will not be maintained when it is manifest that it is useless, and the grounds on which it is granted no longer exist.—*Steiner v. Scholze*, 105 Ala. 687; 10 A. & E. Enc. of Law, 786. An adequate remedy at law exists before a quasi judicial tribunal.—§ 718, Code 1907, as amended Acts 1911, p. 118; 22 Cyc. 776.

Z. I. DRAKE and C. P. GRIMMETT, for appellee. No brief reached the reporter.

GARDNER, J.—The bill in this case was filed by the appellee against the appellant to abate a private nuisance. Temporary injunction having issued in accordance with the prayer of the bill, motion was made to dissolve the same, which was overruled by the chancellor (the judge of the law and equity court), and, from this decree, the appeal is taken.

The bill alleges that the respondent has under his control and management, and does maintain a stable in Madison, Ala., where he keeps horses, and that the stable is in unsanitary condition, offensive, and prejudicial to the health of complainant's family. We quote the remaining portion of the second paragraph of the bill as follows: "That said stable or barn is in close proximity to complainant's residence, and that the odor arising from said barn or stable is so offensive that complainant is deprived of the proper use of the free enjoyment of his home; that the said stable or barn is within about 30 feet of complainant's front porch, and the odor arising from said stable or barn is such that your complainant is deprived of the use of the free enjoyment of his front porch and sitting room, and that many times your complainant is compelled to close the windows next to

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said stable in order that the fumes arising from said stable may be kept from entering your complainant's house."

The third paragraph alleges that the said premises as maintained by respondent have been condemned by Dr. T. E. Dryer, health officer of the town of Madison, as a nuisance, and that his acts therein have been approved by the Madison county board of health.

The answer denies the material averments of the bill, except as to the location of the said stable with reference to complainant's dwelling. Respondent also avers that the stable had been there for 20 years, and has been used practically continuously for such period of time, and was there when complainant's house was built; that the use of the stable is a great convenience to respondent as he is a practicing physician, etc.

The stable was maintained by the respondent upon rented premises.

Affidavits were introduced on the hearing of the motion by both parties. We need not here consider these separately. To each we have given careful consideration. The following portion of the affidavit of complainant we find to be practically without contradiction: "I own a home in which I now live with my family in Madison, Ala., and is the house referred to in my original bill of complaint, and I have lived in said house for more than eight years, and that the barn complained of in said original bill is situated about 30 feet, a little southeast of the front of my dwelling, and the end of said barn in which horses have been kept is next to my house, and has been used for such purposes since early spring of this year."

The house of complainant faces south, and this stable, it is stated, is almost in front of the dwelling, being a little east of south thereof.

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Affidavits offered by complainant tend to show there have been no horses kept in the barn during the *summer* months during the last eight years, while those offered for respondent tend to show that horses have been kept in the barn during this time, yet they are not specific in denial of those of complainant, averring that horses were not kept there during the warm season of the year, nor as to the number of horses so kept there, and for what continuous length of time.

Affidavits for complainant tend to show that the odor from the stable was of such an offensive nature that he was to a great extent deprived of the use of his front porch, and was frequently compelled to close also the windows of the sitting room of his house. It is further shown that complainant procured the use of another stable for respondent, without charge, but that such was not availed of by the latter.

It is recognized as the rule that a private stable is not per se a nuisance.—*St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332; 29 Cyc. 1181. It is also well understood, however, that: It may “become a nuisance by reason of the manner in which it is constructed, kept, or used, or by reason of the location being improper or necessarily injurious to a neighbor.”—29 Cyc. 1182, and authorities there cited.

“The law may be regarded as settled that where a business, although lawful in itself, becomes obnoxious to neighboring dwellings and renders their enjoyment uncomfortable whether by smoke, cinders, noise, offensive odors, noxious gases, or otherwise the carrying on of such business is a nuisance which equity will restrain. Nor is it necessary that the nuisance be injurious to health to warrant the interference.”—1 High on Inj. § 772.

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In *Grady v. Wolsner*, 46 Ala .381, 7 Am. Rep. 593, it was said: "Anything constructed on a person's premises which, of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property is a nuisance."

The following from Wood on Nuisances (volume 2, § 597) is also in point: "Not only may a livery stable become a nuisance by improper location and offensive or annoying results, but it is held that *any* private stable or barn may be so located with reference to the dwellings or places of business of others, and be so improperly kept and conducted, as to become an actionable nuisance. Even in the ordinary use of property, in its use for purposes that are regarded as incident thereto, a person is bound to prevent such use from becoming a nuisance to others if possible. A man has no right to erect a barn for the keeping of horses and cattle so near to his neighbor's dwelling as to disturb the rest of those residing there by the noises produced by the animals kept there at night, or to manage it in such a way as to permit offensive stench to emanate therefrom and float over his neighbor's premises, to his serious annoyance and discomfort."

While ordinarily it is, of course, recognized that a man may do an act on his own place that is not unlawful, yet he is not permitted to use his own property to the injury of another. As quoted in the case of *Hundley v. Harrison*, 123 Ala. 297, 26 South. 294: "When he sends onto the lands of his neighbor noxious smells, smoke, etc., then he is not doing an act on his own property, only, but he is doing an act on his neighbor's property also, because every man has a right, by the common law, to the pure air, and to have no noxious smells sent on his lands, unless by a period of time a man has,

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by what is called prescriptive right, obtained the power of throwing a burden on his neighbor's property."

We have statutory definitions of *nuisance*, as in section 5193, Code of 1907, wherein it is said: "A nuisance is anything that worketh hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance."

And again, as in section 5198, as follows:

"A private nuisance may injure either the person or property, or both, and in either case a right of action accrues."

Speaking to the right of the owner of land to the flow of pure air, this court, in *Romano v. Birmingham Railway, Light & Power Co.*, 182 Ala. 335, 62 South. 677, 46 L. R. A. (N. S.) 642, said: "The right is incident to the ownership of land, and must be protected as well as any other valuable right. 'No man has a right to interfere with the supply of pure air that flows over another's land any more than he has to interfere with the soil itself.'"

The following cases from other states involved the like question of a stable, and are of interest in this connection. We therefore cite them: *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421; *Gifford v. Hulett*, 62 Vt. 342, 19 Atl. 230; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665.

In this latter case the opinion makes use of the following language of Mr. Blackstone: "And by consequence it follows that if one does any other act, in itself lawful, which being done, in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act where it will be less offensive. So

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closely does the law of England enforce that excellent rule of gospel morality, of doing to others as we would they should do unto ourselves."

We are cited by counsel to *St. James Church v. Arlington*, *supra* and to *Gallagher v. Flury*, 99 Md. 181, 57 Atl. 672. In each of these cases it was sought to enjoin the *erection* of a stable, and there was therefore involved the question of an *anticipated* nuisance, and the decisions are not therefore authorities in the instant case. The authorities herein cited, and from which we have quoted, demonstrate clearly, in our opinion, the equity of the bill.

We are also reasonably satisfied from the affidavits introduced that offensive odors from the barn in which the horses were kept, situated, as it was, in front of the dwelling of the complainant, and within 30 feet thereof, created much inconvenience and discomfort to complainant and his family, and deprived them of a free enjoyment of their home. We are reasonably satisfied of the existence of such odors at the time of the filing of the bill, and that under all the circumstances the chancellor was justified in his conclusion that the stable, used as it was, and located as it was, created a private nuisance which a court of equity will abate.

We are further reasonably satisfied from what we have before us that the stable had not, for any great length of time, been *used* in such a manner as to become a private nuisance to this complainant, and was not such at the time the complainant's house was constructed. Any question, therefore, as to the length of time the stable building or barn has itself been located as it now is can have no bearing on the result here, and there is no field of operation for any principle growing out of such (1 Wood on Nuisances, § 704 et seq.), nor does it become necessary to consider principles applicable

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to those cases where complainant "came to the nuisance," to use the expression in the books (Wood on Nuisances, *supra*, §§ 574, 576, et seq.; 29 Cyc. p. 1193).

Counsel for appellant argue in brief that it is a matter of common knowledge that the odors and gases from such a place contain ammonia, and "are supposed to be more or less healthful." As to this we find it unnecessary to affirm or deny. We pass it by, just as we would the stables. We feel, however, that we are on entirely safe ground in saying that common observation does *not* teach that invalids, the weak and the afflicted, are advised by their physicians to seek close proximity to such places in the hope of restoration to health and strength. But this is a digression, which, however, we hope is pardonable.

Returning to the more serious vein: It is insisted in brief that, the answer denying the material averments of the bill, the injunction should be dissolved.—*Turner v. Stephens*, 106 Ala. 458, 17 South. 706. The rule, as there announced was not inflexible; but our statute (section 4535 of the Code of 1907) which now permits the introduction of affidavits in all such cases has materially modified the rule.

As it was the *use* of the stable as such—the keeping therein of the horses—that was productive of the nuisance here complained of, it may be doubted whether the provisions of section 718 of the Code constitute any adequate relief. Clearly not so adequate a relief as may be awarded in a court of equity, and as the abatement of a private nuisance is a jurisdiction of the chancery court, which is now well established, and there is nothing in the above section indicating an abridgment of that jurisdiction, we are of the opinion that such provi-

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sions can have no bearing on the result of this suit.—*Evans v. Wilhite*, 167 Ala. 587, 52 South. 845; *Todd v. Leslie*, 171 Ala. 624, 55 South. 174.

We also think it equally as clear that the fact that the stable, after issuance of the temporary writ, is now not offensive, and after, in other words, the nuisance has been abated in obedience to the mandate of the court, gives no support to the motion to dissolve.

What is said in the case of *Steiner v. Scholze*, 105 Ala. 607, 18 South. 79, and 2 High on Inj. § 145, cited in brief, is not applicable to the character of case here under review.

We have not herein commented separately upon each affidavit and given in detail our reasons for the conclusion we have reached. We have, however, given each affidavit careful consideration, and in the light of the evidence before us, as to the location of this stable in such nearness to the front of the home of complainant, and as to the discomfort and inconvenience, which resulted from the odors arising therefrom, we are of the opinion that the chancellor was justified in overruling the motion, and so, enforcing what was denominated by Mr. Blackstone, "that excellent rule of gospel morality, of doing to others as we would they should do unto ourselves."

Of course we have not the case here upon final decree, and as to whether or not it is possible that the stable, located where it is in reference to the home of complainant, can in any event be continued in use as before, in an unobjectionable manner, we are not now concerned. The proper practice as to this, however, is pointed out in the case of *Romano v. Birmingham Railway, Light & Power Co.*, *supra*, citing *Wood on Nuisances*, § 823.

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We conclude that the chancellor properly decreed in overruling the motion, and his decree is therefore affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ.,
concur.

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Bill to Enjoin Judgment at Law.

(Decided May 21, 1914. Rehearing denied July 2, 1914.
65 South, 988.)

1. *Judgment; Equitable Relief; Newly Discovered Evidence.*—In the absence of fraud in the act of obtaining a judgment at law, equity will not interfere, unless a defense at law was prevented because of accident or fraud, or act of the successful party, unmixed with fraud or negligence of the other party.

2. *Same; Fraud.*—Equity will not enjoin the enforcement of a judgment at law merely because of newly discovered evidence, since the reason for the exercise of such jurisdiction has ceased to exist, the courts of law now having ample jurisdiction to grant relief.

3. *Same.*—Equity will not enjoin a judgment at the suit of the unsuccessful party on the grounds of newly discovered testimony in the absence of fraud of the adverse party in obtaining the judgment, where there is no excuse for the failure to procure such evidence for the trial.

4. *Same.*—Equity will not grant relief against a judgment at law as obtained by fraud unless the fraud was practiced in the procurement of the judgment, and in the proceedings by which it was obtained, and not merely where the fraud is antecedent to the judgment, as where material testimony upon which it was rendered was false.

5. *Same; Pleadings.*—The allegations of a bill to enjoin a judgment at law must be positive, specific and explicit.

6. *Equity; Pleading; Demurrer.*—As against a demurrer to a bill in equity, the general conclusion of the pleader is not sufficient.

APPEAL from Birmingham City Court.

Heard before Hon. H. A. SHARPE.

[De Soto Coal, Mining & Development Co. v. Hill, et al.]

Bill by the De Soto Coal Mining & Development Company against Jim Hill and another, to enjoin a judgment at law. From a decree sustaining demurrers to the bill, complainant appeals. Affirmed.

The bill alleges that:

Orator is a corporation existing under the laws of the state of Alabama, with its principal office at Birmingham, and that defendants are respectively, Jim Hill, a minor, and H. J. Hill, an adult, who acted as his next friend in procuring the judgment herein sought to be enjoined; that orator is authorized by its charter to engage in the business of mining, and has been and is now engaged in the operation of a coal mine in Jefferson county, and that Jim Hill on December 7, 1910, while being employed as a trapper in its said mine and while getting off the car, fell and cut his knee on some kind of sharp rock or other substance, and the wound there-afterwards, by some means unknown to orator, became infected, and it became necessary for defendant to come to a hospital at Birmingham and have an operation performed removing the knee joint. Thereafter, on March 4, 1911, said minor by his next friend, H. J. Hill, filed a suit against orator in the city court of Birmingham, claiming \$40,000 as damages for said injury. [Here follows a history of the trial as to the pleadings, and as to the striking of complaint and the final issues made up, all of which are set out as exhibits to the bill.]

Orator further avers that at the conclusion of the evidence and argument, plaintiff through his attorney abandoned all of the counts of said complaint as amended except the first, sixth, seventh, and eighth, relying on the employment of plaintiff in violation of section 1025 of the Code, and disclaiming any right to recover on other counts. The jury trying the cause returned a verdict in favor of plaintiff for the sum of \$5,000, and judg-

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ment was entered accordingly. [Here follows a history of the motion to set aside the judgment, the court's order overruling the motion, the preparation of the bill of exceptions, the appeal to the Supreme Court, and its judgment, together with an application for rehearing, and the overruling of same, all of which are made exhibits.] It is further averred that the judgment was entered in said cause on testimony offered by plaintiff, which your orator could not rebut, to the effect that the minor plaintiff was under 14 years of age at the time of the injury, but since the trial of said cause and a motion for a new trial, it has discovered evidence which shows that plaintiff in fact was more than 14 years of age at the time of the injury, and which evidence it is reasonably certain, if not in fact conclusive, would have resulted in a verdict in your orator's favor, had it been produced on the trial of said cause. [This newly discovered evidence is set forth in the affidavit of M. Aylor and Parton, Joella Jones, William Jones, A. S. Logan and H. H. Coffman, which are made exhibits to the bill.]

It is then averred that the failure to produce said testimony on the trial was due to no fault, neglect, or lack of due diligence or care on its part in the preparation of said cause for the trial, and presenting its motion for a new trial; but, on the other hand, it is averred that, immediately after the filing of the suit, it caused a full and complete investigation to be made of all the facts surrounding the accident to plaintiff, including the charges made in said complaint; that neither plaintiff's father nor mother was living at the time of the accident, although his father was living at the time of his employment a few months prior thereto, and it was on the written request of plaintiff's father, representing that plaintiff was more than 14 years of age, that such

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employment was given him. Plaintiff's stepmother was living, but did not know plaintiff's age of her own knowledge, nor could orator ascertain from any other person any independent knowledge, but in the course of the investigation and preparation for the trial plaintiff's family Bible, and that of his grandparents, was exhibited containing entries showing that plaintiff was born on September 26, 1897, making plaintiff under 14 years of age at the time of the accident; that this Bible was exhibited by an uncle of plaintiff, a member of plaintiff's family, and that its superintendent was not an expert in handwriting, and had no reason to suspect and did not suspect, but assumed that said date was correct. It is then averred that at the time of the accident and casualty, orator had in the Maryland Casualty Company of Baltimore an employee's liability policy, protecting it against the payment of damages for injury to its employees; that said policy contained a provision that it did not cover liability for an injury to any one employed by orator contrary to law. (Then follows a description of the investigation made by the agent of the Casualty Company similar to that set out as made by the superintendent of orator, and the ascertainment from all the facts that plaintiff was under 14 years of age at the time of the accident, resulting in the finding that the boy was under 14 years of age, resulting in casting the whole defense and burden upon orator. The bill then recites the efforts put forth by orator to ascertain something of the early history of plaintiff, and finally discovering that the boy was born in September, 1896, instead of 1897, making him over 14 years old at the time of his employment, and at the time of the injury, but that at that time no course was open to orator to get the information in the record on the appeal of said cause to the Supreme Court.) It is

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then averred that the evidence is not cumulative, and that it shows that the cause was without merit, and that plaintiff was in fact more than 14 years old, that the judgment is unjust and unconscionable, and that orator has exhausted every legal remedy open to it, and without the protection of this court, his property will be levied on and sold to satisfy the execution.

The demurrers raise the points discussed in the opinion.

J. T. STOKLEY, R. H. SCRIVNER and JOHN R. TYSON, for appellant. It is a well recognized principle of equity jurisprudence that newly discovered evidence showing a valid defense to an action constitutes a good ground for equitable relief from a judgment at law in the absence of negligence in failing to present such evidence on the trial.—*Wilson v. Wilson*, 21 South. 67; *Cox v. M. & G. R. R. Co.*, 44 Ala. 611; *Waters v. Craig*, 4 S. & P. 410.

VASSAR L. ALLEN and JAMES M. HANBY, for appellee. As to what the bill must contain, see *Headley v. Bell*, 84 Ala. 347; *French v. Gardner*, 7 Port. 549. The bill fails to make a proper showing for relief, and the court properly sustains demurrers.—Authorities supra.

GARDNER, J.—By this bill appellant (complainant in the court below) seeks to enjoin the enforcement of a judgment recovered against it by respondent in a suit at law in the city court of Birmingham, and affirmed by this court.—*De Soto Coal Mining & Development Co. v. Hill*, 179 Ala. 186, 60 South. 583. The averments of the bill as amended and the demurrers interposed thereto will sufficiently appear in the report of the case. Demurrer to the bill as amended was sustained, hence this appeal.

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As grounds for relief, and in support of the equity of the bill, complainant seems to rely upon the averments of newly discovered evidence, knowledge of which was not obtained until after a motion for a new trial had been heard and overruled. There is no fraud or misconduct charged on the part of the appellee, but the bill is, in effect, in short, what has been termed "an application in chancery in the nature of a new trial at law." In support of the equity of the bill, appellant cites three cases from this state as follows: *Waters v. Creagh, Executors*, 4 Stew. & P. 410; *Cox v. Mobile & Girard R. Co.*, 44 Ala. 611, and *Wilson v. Wilson*, 21 South. 67. This latter case (reported as a memorandum decision in 113 Ala. 670) was a bill filed to review an equity decree. No demurrer was interposed, the opinion stating that: "The sufficiency of the bill was not in any wise questioned, but it was treated by the defendant, by filing her answer to and taking issue on it, as altogether sufficient."

The other two cases cited sought the injunction of a judgment at law, and are more nearly in point.

While the exigencies of this case may not require it, as will hereinafter appear, yet due to the importance of the question presented by this record, we deem a brief review of the authorities both proper and timely.

Anciently courts of law did not grant new trials, and in those days courts of equity exercised that jurisdiction over trials at law, and compelled the successful party to submit to a new trial when justice required it. But even then the chancery court proceeded with great caution. The history of the exercise of this jurisdiction over proceedings of courts of law, by courts of equity, by way of injunction, may be found in the note to the case of *Oliver v. Pray*, 19 Am. Dec. 608, wherein it is shown to have created some unrest and much jeal-

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ousy of the common-law judges. In the same note (page 609) we find the following quotation: "Applications to a court of chancery for a new trial at law are in our time very rare. The practice, except in cases most extraordinary, has long since gone out of use, because courts of law are now competent to grant new trials, and are in the constant exercise of that right to a most liberal extent."

On the next page the author of the note cites instances in which the jurisdiction may still be exercised. He states, citing authorities, that in some particular cases a new trial has been decreed, because the evidence of the facts constituting the complete defense was not discovered until after judgment at law and the lapse of time in which he could then move for a new trial, making the following comment: "In some of these cases it appeared that the complainant, since the trial at law, had discovered a receipt in full for the demand on which the judgment was rendered against him, but, even in cases of this extreme character, it is now questionable whether jurisdiction in equity can be maintained. There must, in the language of the most eminent judges, 'be an end of litigation.'"

In the note to the case of *Little Rock, etc., Ry. Co. v. Wells*, 54 Am. St. Rep. 227, the author says: "The principle that equity will not enjoin a judgment because of newly discovered evidence merely is almost of universal application."

Mr. Pomeroy, in his work on Equity Jurisprudence (3d Ed., vol. 4, § 1365), says: "The jurisdiction of the English chancery to enjoin judgments at law, not by reason of any equitable right involved in the controversy itself, but on account of wrongful acts or omissions accompanying the trial at law, originated at a time when the law courts had little or no power to grant

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new trials for such causes. To prevent a failure of justice, a distinct head of equitable jurisdiction was admitted, that of virtually granting new trials, of entertaining suits for a new trial, when a judgment at law had been thus obtained by fraud, mistake, or accident; and the injunction against further proceedings on the judgment was a mere incident of the broader relief which set aside the judgment and granted a rehearing of the controversy in the court of chancery. The original occasion for this special jurisdiction has disappeared."

The author then states that in England, and most, if not all, of the American states, either by statutes or by judicial action, courts of law have acquired and constantly exercised full power to grant new trials. To again employ his language: "In other words, the powers of the law courts to set aside verdicts or judgments are so ample as to meet all requirements of equity and justice, and the special equitable jurisdiction with respect to this matter has become obsolete in the very large majority of the states, if not all of them. * * *

A court of equity in general no longer assumes control over a legal judgment for the purpose of a new trial or any similar relief; it will, in a proper case of fraud or mistake, set aside such judgment, and wherever it will grant this final remedy, it will, as a preliminary and incidental relief, restrain by injunction all proceedings upon the judgment."

This question was given consideration by our courts in the case of *Norwood v. L. & N. R. R. Co.*, 149 Ala. 151, 42 South. 683, and much of the above quotation from Mr. Pomeroy is found in the opinion. In addition is found a quotation from Chancellor Kent from which, for convenience, we take the following extract: "Anciently courts of equity exercised a familiar jurisdiction

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over trials at law, and compelled the successful party to submit to a new trial or to be perpetually enjoined from proceeding on his verdict. * * * But this practice has long since gone out of use, and such jurisdiction is rarely exercised in modern times, because courts of law are now in the competent and liberal exercise of the power of granting new trials."

In the case of *Hardeman v. Donaghey*, 170 Ala. 362, 54 South. 172, is also found a discussion as to when equity will interfere with the judgment at law. We can do no better than to take from this opinion a few quotations, which will be in point, as follows: "Our court, in discussing the rights to equitable relief against judgments in courts of law, in the case of *Noble v. Moses*, 74 Ala. 616, speaking through SOMERVILLE, J., says: 'There can be no controversy as to the general rule on the subject. It is settled to be that the fraud which is imputed to the plaintiff in the judgment, and for which alone a court of equity will intervene to vacate or enjoin, must be *fraud in the rendition or procurement of the judgment itself*.'—*Cromelin v. McCauley*, 67 Ala. 542. Or, as expressed by Mr. Story, 'the fraud must have been practiced in the very act of obtaining the judgment,' there must be 'fraud in its concoction.'—2 Story's Eq. Jur. § 1575. * * * If there be no fraud in the act of obtaining or procuring the judgment, and equitable relief be sought against the judgment on a ground which went to the merits of the original suit at law, and which would have been available in that forum, the complainant is required, as a condition precedent to relief, to prove, as well as aver, three things: First, that he has a good and meritorious defense to the cause of action, or so much of it as he proposes to litigate; second, that his failure to defend at law was not attributable to his own omission, fault, or neglect; and, third,

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that it was attributable to fraud, surprise, accident, or some act of his adversary, the plaintiff in the judgment.—*Weems v. Weems*, 73 Ala. 462; *Collier v. Falk*, 66 Ala. 223; Freeman on Judg. § 486; Willard's Eq. Jur. 161-163. There will be, in other words, no interference with the judgment at law, or reopening of the litigation involved in its rendition, unless a defense at law was prevented 'because of accident, or the fraud or act of his adversary, unmixed with fault or negligence on his part.'—*Waring v. Lewis*, 53 Ala. 615; *Duckworth v. Duckworth*, 35 Ala. 70; 2 Story's Eq. Jur. §§ 887, 888."

Our statute provides for a rehearing in the court of law where a party has been prevented from making his defense by surprise, accident, mistake, or fraud, without fault on his part, by applying therefor within four months from the rendition of the judgment. Of this statute, our court, speaking through Chief Justice BRICKELL, in the case of *Renfro Bros. v. Merryman & Co.*, 71 Ala. 195, had this to say: "The statute is intended to provide in the court rendering the judgment a less expensive and more speedy remedy than is afforded by a resort to a court of equity in such cases. The class of cases in which the statute authorizes the court of law to interfere is precisely the class of cases in which a court of equity is accustomed to afford relief against judgments at law; and, in the numerous decisions which have been pronounced on the statute, this court has kept steadily in view the principles on which courts of equity proceed in granting the relief which a court of law may, under its provisions, extend."

This court has recently held that the statute does not take away the equity jurisdiction, but that it confers a concurrent and cumulative remedy.—*Evans v. Wilhite, et al.*, 167 Ala. 587, 52 South. 845.

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In the case of *Waldrom v. Waldrom*, 76 Ala. 289, we find the following language: "A proper and due regard for the peace and interests of society requires strictness and caution in exercising the power to disturb the decrees and judgments of other courts of competent or concurrent jurisdiction, and reopening controversies, which it is the policy of the law to quiet.

* * * To successfully invoke the interposition, it is not sufficient that wrong has been done, but it must be manifest that the wrong occurred because of accident, surprise, fraud, or the act of the opposite party, and without fault or neglect on the part of the party complaining."

It is thus seen by an examination of our authorities that the rule as stated in *Hardeman v. Donaghey*, *supra*, is that by which our court has been guided in such cases since its early history. Such also seems to be the rule in the federal court.—*Embry, Adm'r, v. Palmer, et al.*, 107 U. S. 11, 2 Sup. Ct. 25, 27 L. Ed. 346; *Crim v. Handley*, 94 U. S. 652, 24 L. Ed. 216; *Pickford v. Talbott*, 225 U. S. 651, 32 Sup. Ct. 687, 56 L. Ed. 1240.

On the point in question we are unable to find the case of *Waters v. Creagh*, 4 Stew & P. 81, *supra*, cited in any of our subsequent decisions. The case of *Cox v. Mobile & Girard R. Co.*, 44 Ala. 611, *supra*, we find cited only once in our subsequent decisions, in the case of *Beadle v. Graham*, 66 Ala. 102, where the opinion concludes with the following sentence: "This ruling is not in conflict with *Cox v. Railroad*, 44 Ala. 611; but if it were, we would not be inclined to follow that case."

These observations must lessen the weight of these cases as authority. We are aware that there are other authorities which would seem to support the conclusion announced therein.—23 Cyc. 1030, 31 L. R. A. 571, note.

We have shown that this jurisdiction originated in

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the failure of the law courts to grant new trials. These courts are now held to have the inherent power to grant new trials, and by virtue of section 2846 of the Code rulings thereon are now reviewable. The reason for the jurisdiction has long since ceased to exist, and, as stated by Mr. Pomeroy, the jurisdiction itself has become obsolete. We have found no case in our state since that of *Cox v. Railroad*, *supra*, where our court has set aside a judgment at law for newly discovered evidence merely. In numerous authorities it has been said that where equitable relief is sought against the judgment on the grounds which went to the merits of the original suit at law, and which would have been available in that forum, the complainant is required to aver that he has a good and meritorious defense to the cause of action, or to so much of it as he proposes to litigate, that his failure to defend at law was not attributable to his own omission, fault, or neglect, and that it was attributable to fraud, surprise, accident, or mistake, or some act of his adversary.

It was said, as far back as the case of *Watts v. Gayle*, 20 Ala. 817, that: "The rule allowing parties to appeal to chancery against a judgment in another court is of great strictness and inflexibility, and it is necessary that it should be so, as otherwise the jurisdiction of that court would soon supplant that of all other tribunals."

To open the portals of equity for the review of causes determined in a court of law, for newly discovered evidence merely, however important and relevant it may have been, would, in our opinion, tend to prolong litigation, destroy the conclusiveness of judgments, and hamper the administration of the law. For the repose of society, for the public good, there must be an "end to litigation."

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We, therefore, decline to thus extend the rule as recognized in the case of *Cox v. Railroad, supra*, and *Waters v. Creagh, supra*; and in so far as these authorities are in conflict with this opinion they are hereby overruled.

We stated in the outset that the necessities of this case did not require a review of the authorities as herein given. This we stated for the reason that in any event the complainant's averments failed to acquit it of negligence. In a bill of this character, to obtain an injunction against a judgment at law, the allegations must be positive, explicit and certain.—23 Cyc. 1040. Complainant must show diligence, and the facts relied on must be averred. Facts must also be averred which show the complainant free from fault and not lacking in diligence. As against a demurrer, the general conclusion of the pleader is insufficient.

The bill shows the pendency of this suit at law for approximately nine months before the trial, each count of the complaint alleging the age of the boy to have been under 14 years at the time of the injury. The bill shows that the complainant made inquiry of the respondent's relatives, and of other persons in the neighborhood where the respondent lives and was reared, as to his age; that neither his father nor his mother was living at that time; that the respondent's stepmother, with whom the boy was living at the time of the accident, did not know his age of her own knowledge, but that in the course of its investigation there was shown to its agent the family Bible, showing the birth of the boy to have occurred on September 26, 1897, the said Bible being exhibited by the boy's uncle. The complainant did not suspect the entry to be incorrect.

It is further alleged that at the time of the accident the complainant carried insurance with the Maryland

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Casualty Company, which provided that said company would defend at its own expense suits for such injuries, but that the policy did not cover liability for an injury to one employed in a mine contrary to law; that the agent made investigation, and there was exhibited to him the said family Bible; that the said agent relied upon the correctness of said entry as showing the true date of the boy's birth, and denied liability under the policy, and withdrew from the further defense of the suit; that thereupon the defense of said suit was assumed by said complainant; that complainant had no reason to suspect that the entry in said Bible was incorrect, until it developed on the trial, from the testimony, that the entry of the date was made at the same time that the dates of the births of the next two children were entered, which was several years (at least seven or eight, and probably nine) after the boy's birth; that this fact, in connection with the note on which the boy was employed, written at the instance of his father, and representing that he was 14 years of age, led the complainant to suspect, for the first time, the entry to be erroneous, and that it took immediate steps to ascertain at the place of his birth, which seems to have occurred in the state of Arkansas, the true and correct date thereof, for that purpose inserting a notice in a paper published at Mt. Ida, Ark.; that shortly after its motion for a new trial was overruled it received information from a rural community in Montgomery county, Ark., that the boy was in fact born September 26, 1896. Attached are the affidavits of several persons, who do not appear to have been related to the boy, and who states the date of his birth from recollection as connected with other events, all of which occurred some sixteen years ago. It is thus seen that there is in this bill no averment of fraud, bad faith, misconduct, or of any mis-

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representation. The averments show no more than that the complainant rested satisfied as to the truthfulness of the testimony of the birth, as shown by the entry in the Bible, until the day of the trial. It shows no excuse for the failure of complainant to inquire at the place of the boy's birth, as to his age, during the pendency of the suit, but does show, on the other hand, that, soon after the recovery of this judgment, by the exercise of due diligence, other proof was had as to his age.

It can be no excuse that for a while complainant might have rested the defense with the agent of the insurance company. That was a matter with which this respondent was not concerned, and to which this court cannot look, for an excuse.

We think it clear without further comment that by this bill the complainant has failed to show that degree of diligence required by the authorities; but we are rather impressed by its averment that it was "stimulated by the verdict to a point of effort which it ought to have reached, but did not, before the trial."

Nor are we inclined to the opinion that the averments of this bill show any surprise, within the meaning of our decisions. But even if they did, it should have been made known to the court at the trial, with a request for the withdrawal of the case.—*B. P. McDuffie & Sons v. Weeks*, 9 Ala. App. 282, 63 South. 739; *McClendon v. McKissick*, 143 Ala. 188, 38 South. 1020.

Since the foregoing opinion was written, we have been furnished with a supplemental brief by additional counsel for appellant; and it is now insisted that the bill shows *fraud* sufficient to come within the above stated rule, the said fraud consisting in the use of the said Bible with the birth entries, in evidence.

We have just had occasion to review some of the authorities on this point, in the case of *John Hogan v.*

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John Scott, 186 Ala. 310, 65 South. 209, and we need only state that a reference thereto will disclose that the bill here is wholly insufficient upon ground of fraud in procurement, or, as sometimes expressed, "in the concoction," of the judgment. For convenience we will note a few of the cases: *McDonald v. Pearson*, 114 Ala. 630, 21 South. 534; *Hardeman v. Donaghey*, 170 Ala. 362, 54 South. 172; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736; *Dringer v. The Receiver, etc.*, 42 N. J. Eq. 573, 8 Atl. 811.

The chancellor properly sustained the demurrer to the bill, and his decree is here affirmed.

Affirmed. All the Justices concur.

Scruggs v. Yancey.

Bill for Partition.

(Decided June 30, 1914. 66 South. 23.)

Wills; Estate Devise.—A devise of the net income to be derived from an undivided half of certain real estate to an orphanage, without limitation as to time, constitutes a devise of the fee of one-half of the property; a devise of the rents and profits of the land being the equivalent of a devise of the land.

APPEAL from Jefferson Chancery Court.

Heard before Hon. A. H. BENNERS.

Bill by John L. Yancey against the Alabama Methodist Orphanage and Willie Jordan Turner Scruggs for sale for division. Decree for complainant, and respondent Scruggs appeals. Affirmed.

The following are the items of the will referred to in the opinion: (4) I further give, devise and bequeath to the Alabama Methodist Orphanage the net income to

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be derived from the other undivided one-half interest of the said N. $\frac{1}{2}$ of block 10, in block 100, fronting 20 feet on the east side of 20th street, and with that width of front extending backward 100 feet, situated in Birmingham, Alabama. With reference to all the devises herein made to the Alabama Methodist Orphanage, I will and direct that after the payment of taxes insurance and repairs that the net income to be so derived shall be is hereby devoted forever to the care and support of orphans in said Methodist orphanage, and the Alabama Methodist Orphanage will not have the power to alienate or grant the property in fee, the income to which is hereby given to it. Said Alabama Orphanage is located at Summerfield, Alabama.

(5) I further devise and give to the Alabama Orphanage all the rest and residue of my estate not hereinbefore disposed of, of which I may be possessed at my death.

E. J. SMYER, for appellant. Counsel discuss the question presented, but without citation of authority.

SMYER & SMITH and VASSAR L. ALLEN, for appellee. The decree should be affirmed on the authority of *Guesnard, v. Guesnard*, 173 Ala. 250; *Stein v. Gordon*, 92 Ala. 532.

GARDNER, J.—By this bill the complainant, John L. Yancey (appellee here), seeks a sale of a certain lot in the city of Birmingham, Ala., for division among the joint owners thereof.

The bill shows that one Margaret A. Turnbough died seised and possessed of the said lot in Birmingham, Ala., described as follows: "The north half of lot 10, in block 100, said lot fronting 20 feet on east side of Twentieth

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street, and running back with that uniform width 100 feet; said property being described in accordance with the plan and survey of the Elyton Land Co.”

It is further alleged that said Margaret A. Turnbough left a last will and testament, which was duly probated, and in which said will she devised to Willie Jordan Turner Scruggs a one-half undivided interest in and to said above-described lot, and devised to the Alabama Methodist Orphanage “the net income to be derived from the other undivided half of said lot.”

The will and decree probating same are made exhibits to the bill. The reporter will set out items 4 and 5 of the will in his report of this case. There was a codicil to the will, which is not of importance here further than a note that in item 1 of said codicil the said Willie Jordan Turner Scruggs and the Methodist orphan asylum are referred to as being “named as devisees of said storehouse and lot in my said last will.”

It is shown that Willie Jordan Turner Scruggs and husband conveyed to the complainant by deed dated December 12, 1905, the undivided half interest in said lot owned by said Willie Jordan Turner Scruggs, and that complainant is now the owner of such half interest.

It is alleged that, if the claims of Alabama Methodist Orphanage that it is the owner of the other half interest in said lot are well founded, then complainant and said orphanage are joint owners and tenants in common, each owning an undivided one-half interest, and that, if such claim is not well founded, then as to said one-half interest in said lot the said Margaret A. Turnbough died intestate, and same vested in her heirs; the said Willie Jordan Turner Scruggs being one of said heirs, if not the only one surviving. The bill avers that

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the property is incapable of an equitable division, without a sale thereof.

The chancellor held and so decreed that the Alabama Methodist Orphanage was owner of the one-half interest in said lot in trust for the uses and purposes as set forth in said will, the complainant being the owner of the other one-half undivided interest, and decreed a sale of same for division. From this decree, respondent Willie Jordan Turner Scruggs brings this appeal.

Counsel for appellant in brief says: "It is conceded that the property cannot be fairly and equitably divided, without a sale. It is also conceded that Yancey, as a joint owner, has the right to have the property sold for division."

Only two questions are argued in brief, as follows: "First. Did the devise of the net income to the orphanage [item 4 of the will] have the legal effect to vest the title absolutely to the undivided one-half interest in the orphanage? Second. If such interest did not so vest under item 4, did it vest under item 5, the residuary clause of the will?"

Addressing ourselves to the first question above presented, it is to be noted that by item 4 of the will the said orphanage is given the net income to be derived from the other undivided one-half" of said lot, and this without limitation as to time.

In the case of *Earl v. Rowe*, 35 Me. 414, 58 Am. Dec. 714, it is said: "The effect of a devise of the 'occupation and profits' of land, when there was no devise in terms of the land, became early a subject of judicial consideration, and the decision was that it was in substance a devise of the land. * * * And a devise of 'half the issues and profits' of the land was decided to be a devise of half of the land. 'For to have the issues and profits and to have the land is all one.'"

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In *Wilson v. Curtis*, 90 Me. 463, 38 Atl. 365, it is said: "It is a familiar and well-settled rule of law that a gift of the income of real estate is a gift of the real estate itself. A gift of the income for life is the gift of a life estate, while a gift of the perpetual income is a gift of the fee."

The following quotation from *Traphagen v. Levy*, 45 N. J. Eq. 448, 18 Atl. 222, cited by this court in *Stein v. Gordon*, 92 Ala. 532, is also in point: "It is well settled that a devise of the income or of the rents and profits of lands, without limitation as to time either in the devise or by other disposition of the rents and profits, or of the land itself, is tantamount to a devise of the land itself in fee."

See, also, *Beilstein v. Beilstein*, 194 Pa. 152, 45 Atl. 73, 75 Am. St. Rep. 692; *Passman v. Guarantee Trust & Deposit Co.*, 57 N. J. Eq. 273, 41 Atl. 953.

This rule of law has also been recognized by this court and more recently in case of *Guesnard v. Guesnard*, 173 Ala. 258, 55 South. 524, wherein we find the following: "The devise of the income of the property, without limit carried with it the property itself"—citing *Stein v. Gordon*, 92 Ala. 532, 9 South. 741; and 1 Jarman on Wills (6th Ed.) p. 7)58.

Further discusison of the principle is therefore unnecessary. A reading of these authorities will suffice to show that the language of the will by which is devised to said orphanage the "net income to be derived from the other one-half undivided interest" in said lot, without limitation as to time, and no disposition being made of such interest in the lot itself, is sufficient to pass the fee to such undivided one-half interest in the lot itself.

The chancellor, in our opinion, correctly so held, and decreed that the said Alabama Methodist Orphanage

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was the owner of one-half interest in said lot, in trust for the uses and purposes as set forth in said will of Margaret A. Turnbough.

This conclusion renders unnecessary a consideration of the effect of the residuary item 5 of the will.

The decree of the chancery court is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ.,
concur.

SUBJECT INDEX

ACCOUNT.

Account; Evidence; Best and Secondary.—Where the action was for the balance due on account, it is competent to permit a witness to testify that he had a statement of all the items introduced in evidence when he went over the account with defendant; this not being an attempt to prove the contents of the written statement, but only to prove its existence so as to make it an agreed or stated account at the time the parties went over the account.—*Baker v. Britt-C. Shoe Co.*, 225.

Same.—Where defendant introduced a letter written plaintiff enclosing a check to be applied to his old account, promising to pay the balance, and asking that a note be sent to close up the invoices of certain purchases, and plaintiff introduced a letter in reply stating that the check had been placed to defendant's credit, that a note was enclosed as requested, and that another note for the balance of the old account with interest to date was also enclosed, it was competent to introduce evidence as to the authenticity of this last letter, and that it was properly directed, mailed, etc., such letter making a sufficient predicate for proof as to the amount due on the account at the date of the letters.—*Ib.* 225.

ACTIONS.

1. Splitting Cause.

Action; Splitting Cause.—The bringing of such an action for one-third of the tax did not violate the rule against splitting a cause of action, as the failure of the judge to collect the tax created a distinct breach of his duty to the county as well as to the state, giving rise to a separate and distinct injury, each, therefore, having a separate cause of action.—*Hudgins v. Pickens Co.*, 141.

ACTS CITED OR CONSTRUED.

General.

- 1900 p. 63. *Fletcher v. The State*, 1.
- 1900 p. 63. *Southern Ex. Co. v. The State*, 454.
- 1900 p. 8. *Southern Ex. Co. v. The State*, 454.
- 1900 p. 305. *Spicer v. The State*, 9.
- 1900 p. 305. *O'Rear v. The State*, 71.
- 1900 p. 305. *Washington v. The State*, 101.
- 1900 p. 317. *Tennison v. The State*, 90.
- 1911 p. 26. *Southern Ex. Co. v. The State*, 454.
- 1911 p. 146. *State ex rel. Tax Commission v. Smith*, 432.
- 1911 p. 193. *Sec. 4. Brown v. Protective L. I. Co.*, 166.
- 1911 p. 193. *Sec. 33-F. Brown v. Protective L. I. Co.*, 166.
- 1911 p. 249. *Southern Ex. Co. v. The State*, 454.
- 1911 p. 349. *Walters v. Lyons*, 525.
- 1911 p. 487. *Age-Herald Pub. Co. v. Waterman*, 272.
- 1911 p. 550. *State ex rel. Tax Commission v. Smith*, 432.
- 1911 p. 634. *McCray v. Sharpe*, 375.
- 1911 p. 670. *Betty v. The State*, 211.
- 1911 p. 690. *Purifoy v. Teasley*, 416.

Local.

- 1888-9 p. 797. *Ex parte Donk*, 406.
- 1900 p. 356. *Compton v. Jefferson County Savings Bank*, 194.
- 1911 p. 315. *Fletcher v. The State*, 1.

ADOPTION.

Adoption; Validity of; Statutes.—Under section 5202, Code 1907, an instrument adopting a child which does not show an acknowledgment by the adopting parent before the probate judge, is without effect, unless there is evidence that the adopting parent actually acknowledged the instrument before the probate judge; the mere fact that the adopting parent and child exercised the rights and performed the duties of the relation of parent and child for about thirty years, and until the death of the adopting parent, does not relieve the child of the necessity of such proof.—*Prince v. Prince*, 559.

ADVERSE POSSESSION.

See Ejectment.

Adverse Possession; Notice; Failure to Give.—Where defendants held possession of lands from 1895 to 1913, under a bona fide claim of inheritance, asserting that their ancestor was in possession, while in fact, such ancestor had only an estate by curtesy, defendants' holding ripened into an adverse title prior to the adoption of the Code of 1907, and as section 1541, Code 1896, did not require filing of notice in such cases, defendants were not required to file such notice, and they held an adverse claim, although they failed to file the notice required by the Code of 1907.—*Childs v. Floyd, et al.*, 556.

ANIMALS.

1. Stock Law Election.

Animals; Stock Law Election; Mutilated Ballot.—Where seventy-eight ballots were cast at a stock law election, thirty-nine for and thirty-eight against, and the remaining ballot was so mutilated that the intention of the voter could not be ascertained, the result should have been declared in favor of stock law, in the absence of other irregularity.—*DeKalb Co. v. Price*, 416.

Same; Contest; Review.—The qualifications of voters whose votes were eliminated by the probate court in a stock law election contest, cannot be reviewed on appeal where the evidence introduced relative thereto as not preserved in the bill of exceptions.—*Ib.* 416.

Same.—The action of the probate court in a stock law election contest, in eliminating a ballot because it failed to disclose whether it was for or against stock law, can not be reviewed, where neither the ballot nor any description of the ballot is before the appellate court.—*Ib.* 416.

Same.—Where, in a stock law election contest, the record contained a recital of the evidence as to the residence of certain persons whose votes were contested, the presumption was that it contained all the evidence thereon; and hence, the finding of the probate court on those matters was reviewable.—*Ib.* 416.

APPEAL AND ERROR.

1. Harmless Error.

(a) Evidence.

Appal and Error; Harmless Error; Evidence.—The fact that accused was permitted to testify to facts which other witnesses were called to prove did not render the exclusion of the testimony of such witness harmless to defendant, since a defendant cannot be compelled to testify, nor to prove his own defense by his evidence alone.—*Spicer v. The State*, 9.

Appeal and Error; Harmless Error; Evidence.—Where facts are subsequently proven without objection, or are admitted by the other

APPEAL AND ERROR—Continued.

party, any error in excluding evidence of such fact is not prejudicial.—*Francis v. The State*, 39.

Appeal and Error; Harmless Error; Evidence.—The exclusion of evidence of a witness who had known defendant for some time that he never saw defendant use anything but a small pearl handled knife, different from the one found near deceased, was harmless, although erroneous under the particular facts in this case.—*Davis v. The State*, 59.

Appeal and Error; Harmless Error; Evidence.—The admission in evidence of the telegram without the necessary preliminary proof was harmless, or cured by the subsequent introduction of a subsequent letter clearly referring to the telegram, and covering the same matter; especially where it appeared that subsequent to the telegram all negotiations between the parties were broken off, and that it was by reason of a renewal of their relations that further proceedings were had, and plaintiff's claim was not dependent upon nor controlled by such telegram.—*Rike v. McHugh & Groom*, 237.

Same; Evidence.—Where the verdict was for defendant, no error can be predicated for plaintiff upon rulings on questions of the age of deceased.—*Helms v. C. of Ga. Ry. Co.*, 393.

Same; Harmless Error.—Where the legal evidence abundantly establishes plaintiff's case, errors in the admission of evidence were harmless.—*Garrow, et al. v. Torey*, 572.

(b) Pleading.

Appeal and Error; Harmless Error; Pleading.—Where the general issue was pleaded in due form, any error in sustaining demurrer to a plea which was no more than the general issue, was harmless.—*Tillis v. Smith Sons L. Co.*, 122.

Appeal and Error; Harmless Error; Striking Pleading.—Where a party had the benefit of the same defenses by plea which was not stricken, no harm resulted from the striking of other pleas setting up the same defense.—*Baker v. Britt-C. Shoe Co.*, 225.

Appeal and Error; Harmless Error; Pleading.—The elimination by plaintiff of counts of the complaint rendered harmless to defendant any errors committed in rulings as to such counts.—*Age-Herald Pub. Co. v. Waterman*, 272.

Appeal and Error; Harmless Error; Pleading.—Where the counts which were in, were amply sufficient to present any theory of the case which might be formulated under the evidence, it was harmless error to strike other counts of the complaint.—*Helms v. C. of Ga. Ry. Co.*, 393.

(c) Conduct of Counsel.

Same; Harmless Error; Conduct of Attorney.—Where the answer elicited nothing capable of exerting a prejudicial influence upon the jury, insinuation of counsel in a question to defendant that the excuse of defendant for a repeated failure to go with plaintiff's agent to estimate the value of the improvements, was a mere pretense, was harmless.—*Walker v. Gunnels*, 206.

(d) Instructions.

Appeal and Error; Harmless Error; Instructions.—Where the jury returned a verdict for defendant, any error in instruction as to the measure of damages if the jury should find for plaintiff was harmless to plaintiff.—*Ogburn-G. Gro. Co. v. Orient Ins. Co.*, 218.

Same.—The fact that an instruction is misleading does not call for a reversal, as plaintiff's remedy is to ask for an instruction explanatory thereof.—*Ib.* 218.

APPEAL AND ERROR—*Continued.*

2. Review.

(a) Court of Appeals Decisions.

Appeal and Error; Court of Appeals; Review by Supreme Court.—Where the Court of Appeals found as a fact from the record that witness knew the place inquired about, and could not have been taken by surprise, but was afforded ample opportunity to make any desired explanation, such a finding was a finding of fact which will not be reviewed by the Supreme Court.—*Phillips v. The State*, 57.

(b) Defective Record.

Appeal and Error; Record; Review.—Where no questions were raised on the trial as to the power of the court to try the case at that time, or of the legal organization of the grand jury that returned the indictment, the failure of the transcript on appeal to show the organization of the grand jury finding the indictment and the organization of the court at the trial term, was immaterial under the Supreme Court rules.—*Washington v. The State*, 101.

Same; Defective Record; Dismissal.—Where, on appeal the record is defective for a failure to show the organization of the court at the trial term, and the organization of the grand jury returning the indictment, the result would be the dismissal of the appeal and not a reversal.—*Ib.* 101.

(c) Presumptions on.

Same; Presumption.—Where the bill of exceptions recites that it does not contain all the evidence, it will be presumed on appeal that the evidence not included in the bill of exceptions supported the finding of the trial court.—*Reid v. McElderry*, 150.

Appeal and Error; Review; Presumption.—Where the record did not disclose the demurrer filed, the overruling of the demurrer cannot be held erroneous although the plea to which it was directed was subject to demurrer on one ground; in the absence of the demurrer, the presumption will be indulged, to support the ruling of the trial court, that the demurrer was inapplicable.—*Nicholson v. Killpatrick*, 258.

(d) Findings of Court or Jury.

Appeal and Error; Review; Finding of Court.—Where the evidence is conflicting and the trial was by the court without a jury, the finding of the court will not be reversed on appeal unless clearly against the great weight of the evidence.—*Reid v. McElderry*, 150.

Appeal and Error; Review; Presumption; Finding of Court.—Where the case was tried by the court without a jury, and both competent and incompetent evidence had been admitted, it will be presumed on review by the appellate court that the court considered only the competent evidence; especially where the finding was what it should have been independent of such incompetent evidence.—*International Agri. Cor. v. So. Ry. Co.*, 354.

Same; Review; Verdict.—Verdicts rendered on conflicting evidence are conclusive on appeal.—*Helms v. C. of Ga. Ry. Co.*, 393.

Appeal and Error; Finding; Conflicting Evidence.—Where the evidence was conflicting as to whether the sheriff had an execution in his hands at the time the payments were alleged to have been made to him, so as to bind defendant, a finding by the court in a supersedeas proceeding to quash an execution, that the execution

APPEAL AND ERROR—*Continued.*

was not in the hands of the sheriff at the time of the alleged payment to the sheriff, the sheriff having absconded, will not be set aside on appeal.—*Henderson v. P. & M. Bank*, 584.

(e) Theory Below.

Appeal and Error; Review; Theory of Case.—Where the case is tried in the lower court on one theory, it will be treated on appeal upon that theory.—*Walker v. Gunnels*, 206.

(f) Matters of Discretion.

Appeal and Error; Review; Discretion.—The extent to which cross-examination will be allowed or limited is within the sound discretion of the trial court, and will not be reviewed unless abused.—*Meador v. Evans*, 220.

Appeal and Error; Review; Discretion of Trial Court; New Trial.—Where the charge of the trial court was calculated to mislead, and on that ground the trial judge awarded a new trial, his action will not be reviewed on appeal; his action evidencing the fact that in his opinion the charge did mislead the jury.—*Montgomery L. & T. Co. v. Riverside Co.*, 380.

(g) Objections Below.

Appeal and Error; Review; Objection Below.—Where no objection was seasonably interposed in the trial court to questions propounded to a witness, and responsive answers thereto, such objection cannot be considered on appeal.—*B. R. L. & P. Co. v. Roach*, 306.

(h) Submission on Counts.

Appeal and Error; Review.—Where the complaint contained counts seeking recovery, both under the common law and under the statute, and the court submitted to the jury all the counts, and there was no evidence to support the common law count, a judgment for plaintiff will be reversed, it being impossible to say upon what count the jury based their verdict.—*Langhorne v. Simington*, 337.

(i) Former Decision.

Appeal and Error; Review; Law of Case.—Where the evidence on the second trial was the same as on the first, the determination of the Supreme Court on an appeal from the first trial must be followed on the second, the same being the law of the case.—*Garrow v. Torrey*, 572.

3. Orders Appealable.

Appeal and Error; Orders Appealable; Statutes.—Where a case in the Law and Equity Court of Marengo County had not been set down for hearing on the pleadings alone, rulings on the pleadings were not reviewable on appeal taken under section 28, Local Acts 1909, p. 356.—*Compton v. Jefferson Co. Sav. Bank*, 194.

Appeal and Error; Questions Reviewable.—An order of the Chancellor setting aside the verdict of the jury on issues submitted, demanded by a party to the proceedings and ordering a new trial, will not support an appeal.—*Ex parte Colvert*, 650.

Same.—The right to appeal from orders granting or refusing a new trial in civil cases is wholly statutory.—*Ib.* 650.

APPEAL AND ERROR—*Continued.*

4. Right to Allege.

Appeal and Error; Right to Allege.—Where the action was in Code form against several makers of a note, the only defendant who defended cannot complain that the action was discontinued as to other defendants who were not served, as authorized by section 2502, Code 1907, nor that the service was not proper as to others against whom default judgment was rendered.—*Long v. Girtin*, 196.

5. Assignments and Insistence.

Same; Assignments; Briefing.—Where there were eighteen assignments of error, all relating to the charges, and the brief discussed twenty-six assignments, and as to all but the first three referred to charges not referred to in the assignment, and in some instances to charges not in the record, all the assignments except the first three will be treated as waived under rule 10, Supreme Court Practice.—*Ogburn-G. Gro. Co. v. Orient Ins. Co.*, 218.

APPEARANCE.

Appearance; Waiver of Jurisdiction.—Where the resident plaintiff could not maintain its action because of a breach of faith amounting to a fraud upon the law, an appearance by defendant to contest the jurisdiction of the court did not waive the rights set up in the plea.—*Scssoms Gro. Co. v. Inter. S. F. Co.*, 232.

APPROPRIATIONS.

See States.

ARBITRATION AND AWARD.

Arbitration and Award; Action on Award; Right.—Where there has been no agreement on arbitrators, and the persons assuming to act as such have made only a partial statement of the account between the parties, there can be no recovery on the alleged award, although there has been an attempted mutual waiver of technicality.—*Reid v. McEldery*, 150.

BAIL.

See False Imprisonment.

Bail; Right to; Arrest.—Those who make bail for one accused of crime are not entitled to arrest him without a warrant except as prescribed by section 6351, Code 1907; the right there given being exclusive.—*Nicholson v. Killpatrick*, 258.

BILLS OF EXCEPTIONS.

Appeal and Error; Record; Striking Bill of Exceptions.—Under section 3019, Code 1907, a bill of exceptions must be filed within ninety days from the date of the judgment, and where it appears that it was not filed within that time it will be stricken on motion; a failure to file the bill within such period may be shown by parol.—*Buck Creek L. Co. v. Nelson*, 243.

Exceptions; Bill of; Variance; Documents.—Where the clerk was directed to insert in the bill of exceptions a deed identified by the recital that plaintiff offered in evidence a deed from B and G conveying an undivided one-third interest in the land claimed, dated Dec. 1, 1910, and filed for record Dec. 14, 1910, a deed from B to G was properly inserted in the bill as the word "and" will be considered a clerical misprision for the word "to," the deed otherwise complying with the recitals.—*Bley, et al. v. Lewis*, 535.

BILLS OF LADING.

See Carriers, § 1 (a).

BILLS AND NOTES.

Bills and Notes; Liability as Endorser; Presumption.—Where the note itself bore defendant's signature on its back it showed prima facie that defendant was liable only as endorser, and in an action against such one as the maker of the note, plaintiff could not recover unless this prima facie presumption was rebutted, or unless proper notice of dishonor had been given.—*Long v. Gicin*, 196.

Same; Evidence; Parol.—Where prima facie the note showed that one of defendants was liable only as an endorser, plaintiff could show by parol that although defendant's name was signed on the back of the note, he was in fact, liable as a maker and signed the note as such, and not as an endorser, and defendant was entitled to show if he could, that he was not liable as a maker, but was liable only as an endorser, if at all; parol evidence in such case not varying the written contract, but explaining the real contract, and the intention of the parties.—*Ib.* 196.

Same; Liability of Endorser; Condition Precedent.—An endorser's contract is conditioned on due presentment for payment to the party primarily liable, the maker or acceptor, and notice of dishonor; a failure to make such presentment or give such notice discharges the endorser.—*Ib.* 196.

Same; Presentment; Maker.—A maker of a note being primarily liable is not entitled to presentment or to notice of dishonor.—*Ib.* 196.

Same; Endorsement; Irregular.—Where a party writes his name on the back of a note as endorser, at its inception, and not after it was fully executed, it is an irregular endorsement.—*Ib.* 196.

Same.—The payee of a note is usually the first endorser, and liable next after the maker or acceptor.—*Ib.* 196.

Same; Liability of Endorser; Jury Question.—Under the evidence in this case it was for the jury to say in what capacity defendant signed, whether as maker or endorser.—*Ib.* 196.

BOUNDARIES.

See Ejectment.

Boundaries; Section Line; Location.—Where the sole issue in ejectment was the location of a boundary line between two government sections, such line, when located, was conclusive and fixed, notwithstanding the encroachment by the parties on either side of the line may have ripened into title by adverse possession, since such fact could not change the location of the section line, nor transfer the land so claimed from one section to the other.—*Howard v. Bran-*
nan, 532.

Same; Instructions.—Where ejectment was brought to recover the south half of the southwest quarter of a certain section, and defendant filed a disclaimer and set up that the dispute arose over a disputed boundary line separating sections 17 and 18 in the township, and each party pleaded what he claimed to be the true boundary line, a charge that if the jury were satisfied that the owners of the land on both sides of the M. line had recognized it as the true line, and had held up to such line adversely for more than ten years up to the time defendant bought his land, the jury should find the issues for plaintiff, was beyond the issues and erroneous.—*Ib.* 532.

Same; Boundaries; Parol Evidence.—Where land was described as beginning at the southwest corner and running thence south, etc., parol evidence is admissible to show that the starting point should

BOUNDARIES—*Continued.*

have been the northwest instead of the southwest corner, since the ambiguity is not patent, and the description is sufficient to identify the land; the section being named, and the location with reference to lands of another being given.—*Garrott v. Torey*, 572.

BROKERS.

Brokers; Compensation; Ability and Willingness of Purchaser; Waiver.—Before a broker is entitled to commission he must procure a purchaser able and ready to comply with the terms and conditions of sale, and while the condition as to the ability of the purchase is waived if the owner accepts him knowing or with notice that he is not able, or will not be able to comply with the terms of the sale, yet where no contract is made between the owner and such purchaser, there is no such waiver, though the owner accepts the purchaser, unless at the time of the acceptance he has notice of the purchaser's inability or unwillingness to comply with the terms of the sale.—*Rike v. McHugh & Groom*, 237.

Same; Instruction.—A charge that if an agent communicated to an owner the name of a purchaser, and the owner accepted the purchaser without objection, that in law, operated as a waiver of the requirement that the purchaser be ready, able and willing to buy, although erroneous, was not harmful where the uncontradicted evidence was that the purchaser was ready and willing to purchase, and the failure to carry out the contract arose from some other cause; and this is especially true in view of the fact that the court further charged that unless the owner accepted the prospective purchaser without qualification, then the evidence must reasonably satisfy the jury that the purchaser was able to make the required payments.—*Id.* 237.

Same.—Where the evidence was uncontradicted that the prospective purchaser was ready, able and willing to make and comply with the terms of sale, and that the contract fell through from some other cause, a charge asserting that unless the jury were reasonably satisfied from all the evidence that the purchaser was able to pay cash for the property on or before a certain date, then they should find for defendant, was misleading and inapplicable to the evidence.—*Id.* 237.

CANCELLATION OF INSTRUMENTS.

Cancellation of Instrument; Bill; Sufficiency.—A bill for the cancellation of a conveyance and the rescission of a contract of purchase of land, which, after alleging that respondents fraudulently misrepresented that the land sold extended to a public road, averred that respondents, prior to the conveyance, for the purpose of informing complainant as to their title, furnished an abstract with a plat of the land showing that the land extended up to and along the public road, or so very near thereto that thereby complainant was led to believe that the land to be conveyed extended to the public road, made out no case for equitable relief; since the alternative averment showed that complainant might have discovered the false representation.—*Union Cemetery Co. v. Jackson*, 599.

CARRIERS.

1. Of Goods.

(a) Bill of Lading and Incidents.

Carriers; False Bill of Lading; Complaint.—Where the action was by the buyer of a bill of lading against the carrier purporting to have issued it, for the damages proximately resulting from a con-

CARRIERS—*Continued.*

spiracy between the alleged shipper and the carrier's agent, a complaint alleging that such bill of lading was spurious, that the agent of the carrier in entering into the conspiracy was acting within the scope of his employment, but which does not allege that the things conspired to be done were within the scope of his employment, does not state a cause of action against the carrier either at common law, or under the provisions of section 6136, Code 1907.—*L. & N. R. Co. v. National P. Bank*, 109.

Same; Liability to Purchaser.—Where the purchaser of a spurious bill of lading sues the carrier purporting to have issued it, and in his complaint simply sets up a conspiracy between the alleged shipper and agent of the carrier to do certain things, the issuance of the bill of lading by the shipper and the purchaser thereof by plaintiff as an innocent purchaser, the complaint cannot be sustained on the theory of a system of business in which the issuance and sale of a spurious bill of lading constituted one item, and the issuance of a genuine bill on the delivery of the goods on the forged bill another item, and the delivery or the procuring of the delivery of the goods on the forged bill, another item, and all necessary to carry out the system causing the loss.—*Ib.* 109.

Same; Authority of Agents; Issuance of Bill of Lading.—An agent of a carrier has no authority to issue a bill of lading for goods before they are received for shipment, and the carrier is not responsible for the unauthorized acts of an agent in issuing a bill of lading before receiving the goods.—*Ib.* 109.

Same.—The provisions of section 6136, Code 1907, do not make a carrier liable for the act of an agent in issuing a bill of lading before receiving the goods, where the agent was not authorized to issue bills of lading at all, and to make a carrier liable it must appear that a bill of lading was issued or authorized by an agent charged with the duty of issuing such document.—*Ib.* 109.

(b) Initial and Connecting.

Carriers; Goods; Initial Carrier; Liability.—While under section 5546, Code 1907, an initial carrier is liable for damages to a shipment from negligence of the delivering carrier within the contemplation of the shipping contract, yet such carrier is not liable for damages for the negligence of a carrier to whom the shipment has been delivered under a new contract between shipper and such latter carrier, after the shipment had been carried by the initial carrier to the destination fixed by the original contract.—*Intern. Agri. Cor. v. So. Ry. Co.*, 354.

2. Of Passengers.

(a) Instructions.

Carriers; Passengers; Instructions.—Where the action was by the husband for damages for the loss of society and services of his wife because of injuries received in alighting from a street car, and there was evidence from which it might be inferred that defendant was negligent in prematurely starting the car, although the starting was properly done, a charge asserting that it is not negligence for those in charge of a car to start the same in a proper manner, while a passenger is inside of the car walking towards the door, was properly refused.—*B. R. L. & P. Co. v. Roach*, 306.

(b) Duty to.

Carriers; Duty to Passengers; Degree of Care.—The carrier owes to its passengers the duty to exercise the highest degree of

CARRIERS—*Continued*

care, skill and diligence known to very careful, skillful and diligent persons engaged in a like business, consistent with the practical operation of the business.—*B. R. L. & P. Co. v. Scisson*, 348.

(c) Wantonness.

Carriers; Injury to Passenger; Wantonness.—Defendant was not entitled to have a verdict directed for it under a count charging wanton or willful misconduct where the jury might have found from the evidence that the conductor of the trailer signalled the movement of the cars and caused the doors to be closed at a time when he knew plaintiff was alighting, and was between the doors in such a situation that to move the cars or close the doors would probably result in injury, and that the conductor's action was characterized by a reckless indifference to the probable consequences of the movement of the cars and closing the doors.—*B. R. L. & P. Co. v. Nalla*, 352.

CHARGE OF COURT.

In particular actions and crimes, see that title.

1. Covered by Those Given.

Charge of Court; Covered by Those Given.—It is not error to refuse charges substantially covered by written charges given.—*Spicer v. The State*, 9.

Charge of Court; Covered by Those Given.—It is not error to refuse requested charges substantially covered by requested charges given.—*Francis v. The State*, 39.

Same.—The court having charged that defendant was under no legal obligation to retreat, but could stand his ground and repel the attack, if any was made, the refusal of a charge that defendant had been employed as a night watchman at the place where the difficulty occurred, and was under no obligation to retreat, but could stand his ground, and resist an attack made on him, was not erroneous as the material matters therein contained had already been given in the other instruction.—*Ib.* 39.

2. Reasonable Doubt.

Charge of Court; Reasonable Doubt.—A charge asserting that the jury should acquit if there was a probability of defendant's innocence, was properly refused as not being predicated upon the evidence.—*Davis v. The State*, 59.

Same.—A charge asserting that if from the evidence there is a probability of defendant's innocence, the jury should find him not guilty, even though it has no reasonable doubt from the evidence that defendant is guilty, is self-contradictory, and properly refused.—*Ib.* 59.

3. Abstract.

Same; Abstract.—Where there was nothing in the evidence affording an inference that any witness had exhibited at the trial or elsewhere, prejudice or anger against defendant, charges on the right of the jury to disregard the evidence of witnesses exhibiting prejudice or anger, were properly refused as abstract.—*Davis v. The State*, 59.

4. Applicability to Evidence and Issues.

Same; Applicability to Evidence.—It is always proper to refuse charges which are not predicated upon or supported by the evidence.—*Davis v. The State*, 59.

CHARGE OF COURT—*Continued.*

5. Conformity to Evidence and Issues.

Charge of Court; Conformity to Evidence.—Charges seeking to limit the inquiry as to fraudulent representations to one certain occasion during the negotiations which led up to the sale were properly refused where there was evidence of similar representations made on the occasion when the sale was consummated.—*Tillis v. Smith Sons' L. Co.*, 122.

6. Directing Verdict.

Charge of Court; Directing Verdict.—Where issue is taken on an immaterial or improper plea, and the plea is proven without dispute, the pleader is entitled to the general charge; if, however, the evidence is conflicting as to matters alleged in the plea, the question is one for the jury.—*Nicholson v. Killpatrick*, 258.

7. Cautionary.

Charge of Court; Cautionary Instructions.—A refusal to instruct a jury that unless each juror is reasonably satisfied from the evidence that plaintiff has established all the material averments of at least one count in its complaint, the jury cannot find for plaintiff, constitutes reversible error.—*Langhorne v. Simington*, 337.

8. Ignoring Issues or Evidence.

Charge of Court; Ignoring Issue.—A charge as to what will constitute the debts of the wife and not of the husband, which omits to incorporate the essential facts that the acts enumerated were referable to the indebtedness secured by the mortgage which the wife was seeking to avoid, was properly refused, as ignoring issues.—*Bley, et al. v. Lewis*, 535.

9. Undue Prominence to Particular Matters.

Same; Undue Prominence.—Charges giving undue prominence to a particular portion or portions of the evidence are refused without error.—*Bley, et al. v. Lewis*, 535.

CODE SECTIONS CITED OR CONSTRUED.

- 153. *Brown v. Gay-Padgett H. Co.*, 423.
- 455. *Et. seq. Watters v. Lyons*, 525.
- 718. *Kyser v. Hertzler*, 658.
- 1159. *Rudolph v. City of Birmingham*, 620.
- 1168. *Watters, et al. v. Lyons*, 525.
- 1221. *Ratley v. The State*, 107.
- 1222. *Ratley v. The State*, 107.
- 1274. *Ex parte Whaley*, 381.
- 2082. Subd. 7. *Ex parte Hudgins*, 141.
- 2082. Subd. 9. *State v. Lovejoy*, 401.
- 2083. *State v. Lovejoy*, 401.
- 2216. *State, ex rel. Tax Commission v. Smith*, 432.
- 2218. *State, ex rel. Tax Commission v. Smith*, 432.
- 2219. *State, ex rel. Tax Commission v. Smith*, 432.
- 2220. *State, ex rel. Tax Commission v. Smith*, 432.
- 2222. *State, ex rel. Tax Commission v. Smith*, 432.
- 2473. *Ex parte Hudgins*, 141.
- 2502. *Long v. Gwin*, 196.
- 2751. *Ex parte Seals P. & O. Co.*, 443.
- 2830. *Childs v. Floyd, et al.*, 556.
- 2924. *Ex parte Seals P. & O. Co.*, 443.
- 2961. *Ex parte Seals P. & O. Co.*, 443.

CODE SECTIONS CITED OR CONSTRUED—*Continued.*

- 3019. Buck Creek L. Co. v. Nelson, 243.
- 3126. Ex parte Delpoy, 449.
- 3446. Buck Creek L. Co. v. Nelson, 243.
- 3481. Buck Creek L. Co. v. Nelson, 243.
- 3843. Howard v. Braunan, 532.
- 3910. Subd. 1. W. R. Flowers L. Co. v. Hutchins, 361.
- 4032. Age-Herald Pub. Co. v. Waterman, 272.
- 4353. Kyser v. Hertzler, 658.
- 4497. Bley, et al. v. Lewis, 535.
- 4570. Brown v. Protective L. I. Co., 168.
- 4747-52. Ex parte Seals P. & O. Co., 443.
- 4840. Age-Herald Pub. Co. v. Waterman, 272.
- 5193. Kyser v. Hertzler, 658.
- 5198. Kyser v. Hertzler, 658.
- 5202. Prince v. Prince, et al., 559.
- 5415. Ex parte Hudgins, 141.
- 5546. International Agri. Cor. v. So. Ry. Co., 354.
- 5765. Rudolph v. City of Birmingham, 620.
- 5768. Rudolph v. City of Birmingham, 620.
- 6136. L. & N. R. R. Co. v. National Park Bank, 109.
- 6207. Ex parte Colvert, 651.
- 6209. Ex parte Colvert, 651.
- 6291. Fletcher v. The State, 1.
- 6351. Nicholson v. Killpatrick, 258.
- 7247. Tennison v. The State, 90.
- 7263. Tennison v. The State, 90.
- 7264. Washington v. The State, 101.
- 7399-7402. Betty v. The State, 211.

COMMERCE.

Commerce; Interstate; Collection of Goods at Port for Export.—Where a foreign corporation bought lumber to be delivered in care of the vessel at Mobile, and there inspected and paid for at a specified price per M., the fact that lumber was purchased for export and intended to be loaded on vessel and continue its transportation to a foreign country, did not render the transaction one of interstate commerce so as to remove it from the operation of the state law providing that foreign corporations shall not do business within the state without complying with its laws.—*Brunner v. Mobile-G. I. Co.*, 248.

Commerce; Regulation; Statutes; Construction.—The Fuller Bill (Acts 1909, p. 63), prohibits intrastate shipments of intoxicating liquors, except when made for purposes therein stated, but does not attempt to prohibit interstate shipments.—*Southern Ex. Co. v. The State*, 454.

Same; Federal Statutes; Construction.—The Webb Law (37 Stat. 699) does not prohibit the transportation of intoxicating liquors from one state into another, except where the liquors are to be received, possessed, or in some way used as prohibited by the laws of the latter state, and from such liquors so imported it merely withdraws their interstate character and their immunity from state regulations, and as so construed, it is a valid exercise of the power of Congress to regulate interstate commerce.—*Id.* 454.

Same; Liquor Traffic; Prohibition.—Under the Webb Law, the Carmichael Bill (Acts 1909, p. 8), and the Fuller Bill (Acts 1909, p. 63), an interstate carrier is not prohibited from bringing into the state intoxicating liquors, except only such as are intended for unlawful use in the state, and a carrier in possession of liquors

COMMERCE.—*Continued.*

for delivery to a person who intends to use the same in violation of the state law, or a carrier delivering in a state liquor to a person in the state intending to use the same illegally, violates the state law, unless it has no knowledge of such unlawful purpose.—*Ib.* 454.

CONSPIRACY.

1. Civil.

Conspiracy; Civil Action; Damages.—The gist of an action for conspiracy is the damage and not the conspiracy, and the damage must have been the natural and proximate consequences of the acts of the conspirators; until something has been done or accomplished in the pursuance of the conspiracy it is the mere unfulfilled intention of several persons to commit a wrong, and not actionable.—*L. & N. R. R. Co. v. National P. Bank*, 109.

CONSTITUTION CITED OR CONSTRUED.

- 71. State, ex rel. Tax Commission v. Smith, 432.
- 211. The State v. Ala. Fuel & Iron Co., 487.
- 217. The State v. Ala. Fuel & Iron Co., 487.
- 224. Brown v. Gay-Padgett H. Co., 423.
- 278. Betty v. The State, 211.

CONTRACTS.

See Corporations, §1; Sales.

CORPORATIONS.

1. Contracts and Ultra Vires.

Contracts; Action; Breach; Complaint.—A complaint in an action for a breach of contract need not show that the contract declared on was in writing.—*Buck Creek L. Co. v. Nelson*, 243.

Corporations; Contracts; Powers of Officers and Agents; Limitations.—Under subdivision 10, section 3446, Code 1907, a provision in the certificate of incorporation that the contracts of the corporation should be in writing, signed by its president and countersigned by its treasurer, was not a limitation upon its charter powers, but was in effect a by-law or regulation, not affecting the validity of contracts otherwise executed with persons who had no actual or imputed knowledge thereof; its liability in such case being one of agency as affected by the apparent scope of the authority of the agent acting for it.—*Ib.* 243.

Same; Power; Ultra Vires.—Strictly speaking, an act is ultra vires when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose.—*Ib.* 243.

COUNTIES.

1. Debt Limit, etc.

Counties; Debts; Classification.—The legitimate debts of counties may be divided into two classes; those which are prescribed by law and purely involuntary as to the county, which are preferred claims against the general treasury, and which section 153, Code 1907, requires the treasurer to set aside sufficient funds to pay, and those which are authorized by law merely, and are assumed by the county with some measure of discretion at least as to time and amount, which the county cannot incur when it has reached its constitutional debt limit.—*Brown v. Gay-Padgett Hdware Co.*, 423.

Same; Current Obligations; Anticipated Revenue.—Although a county has reached its constitutional debt limit, it is bound to pay its ordinary current obligations for governmental purposes, and for

COUNTIES—*Continued.*

this purpose may anticipate revenues actually assessed and payable for the year in which the obligations were incurred.—*Ib.* 423.

Same; Voluntary Obligation; Constitutional Debt Limit.—Where a county has reached its constitutional debt limit, all further voluntary obligations assumed or incurred after the expenditure of the full amount of revenues on hand, or in legal expectancy, are debts within the constitutional prohibition and not enforceable.—*Ib.* 423.

Same; Borrowing Money.—Where a county has reached its constitutional debt limit, it cannot borrow money, even to provide funds for current and necessary municipal expenses.—*Ib.* 423.

COURTS.

1. Invoking Jurisdiction.

Courts; Jurisdiction; Non-Residents.—One who claims a right of action for damages against a non-resident must sue for same in the state of the residence of such non-resident, unless, without a fraud on the law, he can obtain service upon such non-resident in this state, by process of attachment, or some other legal way.—*Sessoms (Gro. Co. v. Inter. S. F. Co.)*, 232.

Same; Grounds; Fraud.—Where a resident who claims a right of action against a non-resident for breach of an agreement of sale, ordered a carload of food stuffs from such non-resident with the ostensible purpose of paying for it in cash upon its arrival in this state, and such carload of food stuff was shipped with bill of lading attached, and instead of paying said draft, the said consignee brought action against said non-resident, and attached the contents of the car, this was such a breach of faith as to deny to the consignee the right to litigate its claim in this state, as courts will not lend their jurisdiction to those seeking to obtain it by a fraud upon the law.—*Ib.* 232.

COURT RULES.

10 Sup. Court. *Ogburn-Griffin Gro. Co. v. Orient Ins. Co.*, 218.

DAMAGES.

In particular actions, see that title.

1. Loss of Service of Wife.

Damages; Wife; Loss of Service; Evidence.—Evidence of the service performed by the wife for her husband before her injury, and that she was unable to perform such service thereafter, was admissible in an action by the husband for damages for the loss of the society and services of his wife.—*B. R. L. & P. Co. v. Roach*, 306.

Same.—Where a witness testified that she was intimately acquainted with the wife, and that her health appeared to be excellent, and that she was very active before her injury, it was competent for such witness to testify further that she had never known of the wife to complain of a headache or be in bed a day.—*Ib.* 306.

Same.—It was proper to admit the testimony of a physician who attended the wife that she suffered pain, the action being by the husband for damages for loss of service and society of his wife, because of injuries.—*Ib.* 306.

Same.—It was competent for plaintiff to testify as to manifestations of pain by his wife, and the duration of the condition, on the question of the loss suffered by him from her injury.—*Ib.* 306.

DAMAGES—Continued.

2. Time Lost.

Damages; Instructions; Conformity to Evidence.—Where damages for loss of time were claimed in the complaint, and there was evidence showing a loss of time by reason of the injury, and the monetary equivalent thereof, defendant was not entitled to a charge that plaintiff could not recover for time lost from work.—*B. R. L. & P. Co. v. Nalls*, 352.

3. Personal Injury.

Damages; Personal Injury; Elements; Apprehension.—While a defendant is liable for the damages naturally and proximately resulting to an injured party, including nervousness, damages cannot be recovered for mere apprehension of a future injury by plaintiff not associated with or resulting from some physical infirmity caused by the injury and continuing with and because of that injury or infirmity.—*McCray v. Sharpe*, 375.

DEDICATION.

Dedication; Evidence; Weight and Sufficiency.—The evidence examined and held to show a dedication of such road as it then existed, prior to the erection of the obstruction therein by the then owner of the land.—*Rudolph v. City of B'ham*, 620.

Same; Sale of Lots by Reference to Maps.—Both at the present time and prior to the enactments of the Act which became section 3899, et seq., Code 1896, an owner who made a map or plat of land which spaces thereon indicating roads or streets, and sold lots with reference thereto, dedicated such spaces to the public, leaving them to be opened as streets or roads by the proper local authorities when the public interest required it and such dedication was irrevocable except by legislative enactment.—*Ib.* 620.

DEEDS.

See Estoppel.

1. Description.

Deeds; Description; Certainty of Location.—The deed in this case examined, together with the maps and the description in the complaint, and it is held that the deed was void for want of certainty of description, for the reasons stated in the opinion.—*Wilson v. Carling*, 543.

Deeds; Description; Property Conveyed.—A deed conveying land known as the "Jesse Myers place, described as follows" followed by a description according to government subdivision, shows a purpose to convey the Jesse Myers place, and a misdescription in the government survey, will be disregarded.—*Pendry v. Godwin*, 565.

2. Construction.

Same; Construction.—A deed should be construed to carry out the intention of the parties as ascertained from the deed itself.—*Pendry v. Godwin*, 565.

3. Quitclaim.

Deeds; Quit Claim; Effect.—Although a quit claim deed does not ordinarily carry an after acquired title, yet a quit claim deed reciting that the grantor had remised, released and forever quit claimed unto the grantee in actual possession all rights and interests in possession and expectancy, so that neither the grantor nor his heirs shall or can challenge the title of the grantee, carries with it an after acquired title.—*Garrou v. Torrey, et al.*, 572.

DETINUE.

Detinue; Plaintiff's Ownership; Taxes; Possession as Agent.—Where the action was detinue for certain staves, and defendant pleaded the general issue only, and plaintiff proved a conveyance of the timber on the land from which the staves had been cut, evidence that plaintiff had not paid for the timber conveyed by the deed, had not paid taxes on the land, and that defendant had sold the staves, prior to the bringing of the action, and was in possession merely as agent of the purchaser, was not within the issues, and was therefore inadmissible.—*Gustin v. Wilson*, 580.

Same; Possession; Dental; Estoppel.—Where it was undisputed that defendant had manufactured and removed the staves from certain lands, the timber on which had been conveyed to plaintiff, and on a service of the writ of detinue for the staves, defendant gave a forthcoming bond, and instituted no claim in favor of the alleged purchaser prior to suit brought, he was estopped to deny that he was in possession of the staves at the commencement of the suit, and to claim that his possession was merely that of custodian or agent for his transferee.—*Ib.* 580.

DISMISSAL AND NON-SUIT.

Dismissal and Non-Suit; Grounds.—In an action against several alleged makers of a note, there was no discontinuance in taking a default judgment against those defendants who did not appear, and in proceeding to trial against the others.—*Long v. Girtin*, 196.

Dismissal and Non-Suit; Discontinuance; How Affected.—A discontinuance can only be predicated on some positive act of the actor in the proceeding, or in consequence of the failure or omission of the actor to perform some precedent duty enjoined by law.—*Ex parte Doak*, 406.

DYING DECLARATIONS.

See Homicide, § 1.

ELECTIONS.

See Animals.

Elections; Contests; Grounds.—Acts 1911, p. 349, sections 18 and 25, considered, and it is held that a violation of either of such provisions by a candidate for the office of commissioner of a city was not ground for a contest to the benefit of the opponent of the commissioner elected.—*Watters v. Lyons*, 525.

ELECTRICITY.

Electricity; Regulation; Ordinances.—Within its police powers a city may enact ordinances requiring the insulation of the metal portion of arc lights, provided they are reasonable regulations.—*Briggs v. B. R. L. & P. Co.*, 262.

Sames Inquiry; Action.—Under the evidence in this case, it was a question for the jury whether the negligence of defendant in not insulating the exposed portion of its arc light as required by the ordinance was the proximate cause of the death of plaintiff's intestate.—*Ib.* 262.

Same; Contributory Negligence.—One using the streets of a city may assume that an electric light company has complied with the ordinance requiring the insulation of the exposed metal parts of arc lights, and hence, it was not contributory negligence in bringing a high metal engine into a place where it accidentally came in contact with an uninsulated arc light, through which a deadly current was passing.—*Ib.* 262.

ENDORSERS.

See Bills and Notes.

EQUITY.

For particular equitable actions, see that title.

1. Pleading.

(a) Amendment.

Equity; Pleading; Amendment; Different Causes.—The original bill and the amendment offered thereto stated and considered, and it is held that in view of the provisions of section 3126, Code 1907, the Chancellor erred in refusing the amendment, as it did not change the purpose of the original bill, or make a new case.—*Ex parte Delpey*, 449.

Same.—Under the provisions of section 3126, Code 1907, it is not enough that the amendment offered may make a mere inconsistency or repugnancy of allegation, but there must be an inconsistency or repugnancy of the purposes of the bill as contradistinguished from a modification of the relief in order to render the proposed amendment objectionable.—*Ib.* 449.

(b) Demurrer.

Equity; Pleading; Demurrer.—As against a demurrer to a bill in equity, the general conclusion of the pleader is not sufficient.—*DeSoto C. M. & D. Co. v. Hill*, 667.

2. Findings of Register.

Appeal and Error; Reference; Presumption.—Where the appeal is from a decree overruling exceptions to the report of the register on matters of account, dependent on the register's conclusion from the evidence, all reasonable presumptions are indulged to support his rulings, and they will not be disturbed unless shown to be clearly wrong, based on erroneous conclusions of law, or illegal evidence, or on manifest error in weighing the testimony.—*Gulf Red Cedar Co. v. Crenshaw*, 606.

Same.—The findings of the register on conflicting evidence will be given the same weight as the finding of the jury, and will not be disturbed on appeal unless so palpably erroneous as would warrant the judge in setting aside the verdict under the same circumstances.—*Ib.* 606.

3. Clean Hands.

Equity; Right to Relief; Clean Hands.—It is sufficient to establish that complainant is not entitled to equitable relief because he does not come into equity with clean hands if it appears that complainant has been guilty of unscrupulous practice or overreaching, or has concealed important facts, though not actually fraudulent, or has been guilty of trickery, or taking undue advantage of his position, or unconscientious conduct.—*Horton v. Little, et al.*, 640.

Same.—The facts examined and it is held that although in the first instance complainant was under no duty to disclose his option, yet such duty devolved upon him when he became a quasi partner of defendant in the purchase, and not having performed his duty, was not entitled to equitable relief against respondent by virtue of the maxim that "he who comes into equity must come with clean hands."—*Ib.* 640.

4. Trial of Issues by Jury.

Equity; Trial by Jury.—In his discretion, the Chancellor may submit to a jury controverted issues of fact, and may empanel the jury himself or certify the questions to a law court for trial by jury.—*Ex parte Colvert*, 650.

EQUITY—Continued.

Same; Review; Jurisdiction of Equity.—Where the Chancellor certifies to a law court questions for trial by jury, a party aggrieved by the verdict must have the particulars wherein he supposes himself injured on the trial in the law court certified by the presiding judge thereof to the chancery court, and make such certificate or certified exceptions the basis of a motion for relief before the Chancellor.—*Ib.* 650.

Same; New Trial.—Where the Chancellor directs the trial of the issues of fact by the jury he must set aside the verdict and order a new trial; but the application for new trial must be made to him.—*Ib.* 650.

Same; Issues.—Where a court of chancery directs a suit at law the court of law has power to render judgment and settle all issues involved in the case, but this rule does not apply where only an issue is sent by the court of chancery to a law court for trial.—*Ib.* 650.

ESTOPPEL.

1. By Deed.

Estoppel, by Deed; Operation and Effect.—Where it is sought to fasten an estoppel upon a party to a deed by virtue of a clause therein contained, it is necessary to ascertain what was meant at the time by the deed, and when the intention can be determined, the instrument must be limited in its operations by way of estoppel to accord with the intention.—*Pendrey v. Godwin*, 565.

Same.—Ordinarily, a grantee in a deed is not estopped by the recitals therein, but where the recital showed that the object of the parties is to make the matter recited a fixed fact, the recital is binding on all the parties and their privies.—*Ib.* 565.

Same; Construction.—The deeds and the facts examined, and it is held that the description in the executor's deed was conclusive on the grantee as to the land conveyed, although the grantee did not read the deed, though having full capacity and opportunity to do so, but retained it without reading it.—*Ib.* 565.

Estoppel; Grounds; Recital.—Owners of land who conveyed it by deeds describing it as bounded on a public highway, irrevocably recognized the highway as a public highway.—*Rudolph v. City of B'ham*, 620.

EVIDENCE.

In particular actions and crimes, see that title; see witnesses; trial; appeal and error.

1. Motive.

Evidence; Motive.—Motive is an inducement or that which leads or tempts the mind to do or commit the crime charged.—*Spicer v. The State*, 9.

Same.—The motive for a crime cannot be speculated upon or imagined, and the motive attributed to defendant must have some legal or logical relation to the act charged according to known rules and principles of human conduct; otherwise, it cannot be considered a legitimate part of the proof.—*Ib.* 9.

2. Best and Secondary.

Same; Best and Secondary.—The warrants and caplases under which defendant was detained in jail at the time he wrote a certain letter, were the best evidence that he had not then been charged with or arrested for the killing of his wife, for whose murder he was

EVIDENCE—Continued.

then on trial, but that he was being charged with the murder of a third person.—*Spicer v. The State*, 9.

3. Letters and Documents.

Evidence; Letters.—Where a witness identified a letter purporting to be signed by the letters "O. L. T." and the envelope in which the letter was received bore the postmark of the town stated in the date line in the letter, but on the back thereof were the words, "From J. W. T." followed by the name of the town, the letter was properly admitted in evidence against the objection that the envelope purported to come from one party while the letter purported to be signed by another.—*Francis v. The State*, 39.

Evidence; Letters; Preliminary Proof.—Unless it is in reply to a communication sent by the addressee thereof, a letter or telegram received in due course is not admissible as evidence against the purported sender thereof, without proof that he sent it, or proof of his handwriting.—*Rike v. McHugh & Groom*, 237.

Same.—It was proper to admit in evidence a telegram where it was shown that it was in response to a telegram sent to the purported sender thereof, and it further appeared that a letter of the same date fully covered and confirmed the matter set out in the telegram.—*Id.* 237.

4. Absent Witness Testimony.

Same; Absent Witness; Testimony.—The testimony of a witness taken down at the preliminary trial by a stenographer, and identified by such stenographer as the testimony of such witness, may be read on the trial, if the witness is beyond the jurisdiction of the court at the time of the trial.—*Francis v. The State*, 39.

5. Self-Serving Declarations.

Same; Self-Serving Declaration.—Statements by defendant made sometime after the shooting explaining and exonerating his acts, are not parts of the *res gestæ*, but are self-serving and properly excluded when offered on behalf of defendant.—*Francis v. The State*, 39.

Evidence; Admissibility; Self-Serving Declaration.—In an action by the husband for damages for the loss of the services and society of his wife on account of injuries to her, the testimony of the wife that she did her household work before the injury, but was unable to perform such service afterward, was not inadmissible as a self-serving declaration.—*B. R. L. & P. Co. v. Roach*, 306.

6. Immateriality.

Evidence; Admissibility.—The fact that defendant had been arrested by C. and been turned loose prior to his arrest by the witness, the witness stating that defendant stated that he had been previously arrested by M. but turned loose, was immaterial and properly excluded.—*Washington v. The State*, 101.

7. Admissions.

Evidence; Admissions; Time.—Where the action was by a patron against the telephone company for failure to render service, a statement by the company's manager sometime thereafter to show the qualification of the operator in charge at the time was not admissible.—*Vinson v. So. Bell T. & T. Co.*, 292.

8. Hearsay.

Evidence; Hearsay; Res Gestæ.—Where the horse which plaintiff and her companion was driving became frightened at the approach

EVIDENCE—*Continued.*

of the automobile, throwing them from the buggy, a statement by one S., made after the accident, that he told defendant, who was driving the car, that plaintiff and her companion were coming, and that he should stop, was a mere recital of a past event, and not of the res gestæ.—*McCray v. Sharpe*, 375.

9. Res Gestæ.

Evidence; Res Gestæ; Execution of Mortgage.—Where a married woman, in the absence of the mortgagee, refused to sign a mortgage when requested to do so, stating to the justice of the peace that it was the debt of the husband, such statement was not part of the res gestæ of her execution and acknowledgment of the mortgage on a subsequent day, and hence, inadmissible as against the mortgagee.—*Bley, et al. v. Lewis*, 535.

10. Parol as to Writing.

Evidence; Parol as to Writing.—Where a deed contains everything necessary to a correct understanding of the intention of the parties, parol evidence is not admissible to control its construction or add to its provisions.—*Pendry v. Godwin*, 565.

Evidence; Documentary; Parol to Explain.—Where the ambiguity in a written instrument is patent, parol evidence cannot be admitted to supply the deficiency; the rule is otherwise when the ambiguity is latent.—*Garro v. Tozey*, 572.

11. Judicial Knowledge.

Evidence; Judicial Knowledge.—The courts will not take judicial notice that the offensive odors emitted from a stable contain ammonia, and are "supposed to be more or less healthful."—*Kyser v. Hertzler*, 658.

FALSE IMPRISONMENT.

False Imprisonment; Arrest by Bail; Evidence.—In an action for false imprisonment based on an unlawful arrest by plaintiff's bail, the bail bond is admissible in evidence in justification only where the right of the bail to make the arrest is properly pleaded; when not so pleaded, the bail bond is admissible only in mitigation.—*Nicholson v. Killpatrick*, 258.

FIXTURES.

Fixtures; Removal; Action; Waste.—An action in the nature of waste lies for the wrongful removal of fixtures by a tenant which results in injury to the reversion, and the landlord may apply for an injunction before the removal.—*Walker v. Tullis*, 313.

Same; Right of Lessee.—In the absence of any provision in the lease to the contrary a sub-lessee of an amusement park may remove amusement devices erected by it, if removable without serious injury to the freehold, and made during the term.—*Ib.* 313.

Same; Lease; Construction; Trade Fixtures.—A provision in the lease of an amusement park that after the expiration of the term the lessor may repossess himself, and that all improvements erected on the land during the lease shall revert to him, and that the land with improvements shall revert within thirty days after non-payment of rent at maturity, the failure to perform other conditions on giving notice will not authorize the lessor to prevent the removal by the lessee or the sub-lessee of trade fixtures; the word "improvement" being confined to alterations, repairs, or improvements on the premises not including articles in their nature, chattels.—*Ib.* 313.

FIXTURES.—*Continued.*

Same; Trade Fixtures.—Mere machines or trade fixtures in the nature of chattels, capable of being detached without material injury to the freehold, may be removed by the lessee or his sub-lessee during the term; the machines or trade fixtures having been erected by the lessee or his sub-lessee as fixtures.—*Ib.* 313.

FORMER JEOPARDY.

Criminal Law; Former Jeopardy; Conviction in Recorder's Court.—Under sections 1221-2, Code 1907, a conviction in a recorder's court on a complaint charging assault and battery, with a bar to a subsequent prosecution charging an assault with intent to murder, but based on the same facts, at the same time; the judgment in the first prosecution being a judicial determination that the crime was not a felony.—*Ratley v. The State*, 107.

FRAUD.

Fraud; Representations; Duty to Investigate.—A party to whom representations are made may rely upon them without instituting an independent investigation, where the statements are made as of facts, especially of matters which may be within the knowledge of the party making them.—*Tillis v. Smith Sons L. Co.*, 122.

Same; Opinion.—Where the parties deal at arm's length, the expressions of opinions by a seller as to the property, such as to current market values, etc., cannot be made the ground for an action of deceit, since the vendee had no right to rely thereon.—*Ib.* 122.

Same; Jury Question.—Under the evidence in this case it was a question for the jury whether the representations of the vendor as to the value of the goods were mere expressions of opinion or statements of fact on which the vendee was entitled to rely.—*Ib.* 122.

Same; Trader's Talk.—A seller is not liable either in contract or tort for mere "trader's talk."—*Ib.* 122.

Same; Representations; Opinion.—Although the value of property is often a matter of opinion, yet if the purchaser states his ignorance and invites the opinion of the seller, and gives him to understand that he relies on that opinion, the vendor is not bound to answer, but if he does answer, he must speak the truth, since under such circumstances the affirmation of a definite opinion as to value becomes an affirmation of a fact—of the fact of a bona fide opinion.—*Ib.* 122.

Same; Jury Question.—Whether an opinion of a vendor concerning the value of property has been elicited under such circumstances of confidence as to induce the purchaser to forbear independent investigation, is usually a question for the jury.—*Ib.* 122.

Same.—If, after an independent investigation which proves unavailing or unsatisfactory, a purchaser goes to the vendor, demanding assurance, the question as to whether he relied on an assurance so obtained is for the jury.—*Ib.* 122.

Same; Damages.—In an action for deceit and assumpsit by a purchaser against a seller, the proper measure of damages is the difference between the actual value of the property at the time of sale or exchange, and its represented value.—*Ib.* 122.

HIGHWAYS.

1. Use of.

Highways; Use; Automobiles; Care Required.—Independent of the Acts regulating the operation of automobiles, the common law requires the operator of such a machine upon a highway to exercise reasonable care to avoid injuring others travelling along the highway.

HIGHWAYS—*Continued.*

but, having the right to use the highway in common with such others, such operator is only liable for negligence.—*McCray v. Sharpe*, 375.

2. Establishment and Maintenance.

Highways; Width; Establishment.—Section 5768, Code 1907, does not forbid the establishment of roads more than thirty feet in width.—*Rudolph v. City of B'ham*, 620.

Same; Authority of Commission.—With reference to the establishment and change of public roads, the boards of county commissioners exercise a quasi legislative authority, which other tribunals will not revise or control, unless its action is productive of injury to or interferes with the property rights of individuals.—*Ib.* 620.

Same; Record.—Official action with reference to the location or change of public roads should be shown by the proper record of the boards of county commissioners.—*Ib.* 620.

Same; Encroachments; Limitation.—The acts of county authorities in suffering structures encroaching on a road to remain undisturbed many years, and in caring for the road as limited by such encroachments, did not estop them at any time from re-establishing the public right to the use of the road as defined by actual use prior to such encroachment; limitations do not run against the right of the public in highways, and a mere non-user of part of a highway for any length of time will not operate as an abandonment.—*Ib.* 620.

HOMICIDE.

1. Evidence.

Homicide; Evidence; Motive.—Evidence that defendant had procured insurance upon the life of his wife, payable to himself in the sum of \$17,000.00, was admissible as tending to show motive, the prosecution being for wife murder.—*Spicer v. The State*, 9.

Same.—Where the state claimed that defendant killed his wife in order to collect insurance on her life, the details of the procuring and collecting the insurance, and conversations relative thereto not tending to show guilt or innocence, nor to corroborate or contradict any relevant evidence, is admissible.—*Ib.* 9.

Same.—Where it did appear that defendant said that he would fix up his house with the insurance money, it was not competent to introduce statements made by defendant subsequent to the killing of his wife relative to what he would do as to fixing up his house.—*Ib.* 9.

Same; Relations Between Defendant and Deceased.—Where a defendant was charged with killing his wife, evidence as to actual cruelty on the part of defendant towards his wife is admissible.—*Ib.* 9.

Same.—Where defendant was charged with killing his wife, evidence as to his association and relation with other women, or even the desire of such relation, is admissible, if it appears that the wife stood in the way of his gratifying these desires; but words and acts to or towards other women are not admissible, unless they have a certain tendency to show motive.—*Ib.* 9.

Same.—Relations between defendant and other women are not admissible for the purpose of proving the corpus delicti, the charge being wife murder, but are admissible only where there is other evidence to establish the corpus delicti to repel the presumption of innocence arising from the relationship existing between man and wife.—*Ib.* 9.

HOMICIDE.—Continued.

Same.—Where defendant was being tried for murder of his wife evidence that on one occasion, defendant said to a witness who was walking into church with a young lady unknown to defendant, that if his wife was not there he would take the girl away from the witness; that he advised another witness not to get married, and said that he would not marry any woman the sun ever shone upon; that on another occasion he said, in a laughing way, that if he was not married he would not be, was not admissible in the absence of evidence of a direct nature, to show infelicity between defendant and his wife, or that he was cruel and unkind to her.—*Ib.* 9.

Same; Statements by Deceased.—Evidence as to a statement made by deceased after she had received a mortal wound, which was not a part of the res gestæ of the killing, nor of a dying declaration admitted in evidence, and which did not tend to contradict the dying declarations, was not admissible.—*Ib.* 9.

Same; Threats by Third Person.—Where defendant was on trial for wife murder, and there was evidence tending to show that the wife was shot by a negro boy, and that such boy intended to shoot defendant instead, it was competent for defendant to introduce in evidence threats made by the negro boy towards him.—*Ib.* 9.

Same.—Where the state had introduced evidence tending to show intimate if not criminal relations between defendant and a young woman, and that they were together in an automobile and registered at various hotels, it was competent for defendant to introduce evidence that a brother of defendant and such young woman had had some trouble, and that defendant's brother had procured defendant to carry her away, and that he was doing so when they were seen together, but the details of the trouble between the brother and the young woman were not admissible.—*Ib.* 9.

Same.—Where the state asserted as a motive for the killing the obtaining by defendant of the insurance on the life of his wife, evidence that defendant made proof of his wife's death to the insurance company soon after the killing, was properly admitted.—*Ib.* 9.

Same.—The fact that defendant stated at the time that he was making such proof that he was in no hurry to do so, was properly excluded as a self-serving declaration.—*Ib.* 9.

Same.—The details of purchases and exchanges of automobiles by defendant soon after the death of his wife, and what was said relative to such exchanges and purchases, were not admissible, and was not rendered admissible by a remark of defendant that a particular machine was just right for carrying ladies to ride, or for carrying his children.—*Ib.* 9.

Same.—Where witness did not identify the accused as the man in question, and it was not shown to have had any connection with or relation to the death of the wife, the fact that a man of the same name as defendant was in the house of a certain woman, was improperly admitted.—*Ib.* 9.

Same.—Where defendant was on trial for murdering his wife, and the state had introduced letters written by defendant while in jail, stating that he expected to tell the truth if it broke his neck, defendant should have been permitted to show that at that time he was not charged with killing his wife, but with killing a third person which he had asserted was the murderer of the wife.—*Ib.* 9.

Homicide; Evidence; Dying Declarations.—Where, after making a dying declaration tending to show murder, deceased admitted to be true certain statements made by defendant in his presence which exonerated defendant, such statements are competent as a part of the dying declaration showing what occurred and describing the situation

HOMICIDE.—Continued.

between the parties at the time of the fatal difficulty, and it was error to restrict its scope to contradiction of the previous declaration.—*Tittle v. The State*, 46.

Same; Evidence.—Where the murder was alleged to have followed the burglarizing of a gin house of deceased, evidence that sorghum seed and peas similar to that alleged to have been stolen from the gin house of deceased were found under a pile of lumber several hundred yards from defendant's house was properly admitted, notwithstanding the lumber was located on land which did not belong to defendant, but was piled there by defendant with the consent of the owner, there being other evidence connecting defendant with the crime.—*Pope v. The State*, 50.

Same.—Where the murder was alleged to have been committed by beating deceased over the head, evidence that, on the day after the homicide, a pair of shoes, alleged to have belonged to defendant, and having blood and flesh on them, were found under a house on defendant's premise, was admissible.—*Ib.* 50.

Same.—Where it appeared that defendant went to the mill of deceased on the afternoon before the commission of the crime for the ostensible purpose of having his corn ground into meal, the state claiming that his purpose was to examine the premises preliminary to burglarizing them, evidence that he told a simple minded boy who slept in the mill that he ought not to sleep in the millhouse, and that a snake might bite him there, was admissible.—*Ib.* 50.

Same.—Where the evidence of the identity of the person committing the murder was circumstantial and tended to show that the crime was committed either by defendant or by a certain other person, evidence that such other person was in his room and could not possibly have been at the scene of the crime, was properly admitted.—*Ib.* 50.

Same.—The testimony of the mother of a person who had been suspected of committing the crime with which defendant was charged, that such other person was in his room and not at the scene of the crime, was properly admitted, notwithstanding that at the time she gave such testimony her son was in jail charged with the crime, as this fact merely affected the value of her testimony.—*Ib.* 50.

Same.—The fact that relevant evidence is inconclusive is not ground for excluding it in a murder case or other criminal prosecution.—*Ib.* 50.

Homicide; Evidence.—Where it appeared that deceased had made an attack upon defendant about thirty minutes before the killing occurred, the court properly excluded testimony going into details of the previous difficulty, as such testimony did not have a tendency to sustain defendant's plea to self-defense, but did have a tendency to bring into the case collateral matter.—*Davis v. The State*, 59.

Same; Declarations.—Where the homicide occurred in a store, evidence that defendant, after having a difficulty with deceased at a mill at which they worked, returned home and informed his wife that he was going to the store to settle his account, was admissible to explain his presence at the store, and to rebut an inference of intent and premeditation; such declaration not being inadmissible because of the fact that it was in the nature of a self-serving declaration.—*Ib.* 59.

Same.—Where the state had introduced evidence to show that defendant dropped a knife near the body of deceased after the killing, and defendant claimed that deceased had assaulted him with a knife, a witness for defendant could not testify that another person who had left the country and did not appear at the trial, attempted

HOMICIDE.—Continued.

to induce him to testify that the knife belonged to defendant; such evidence being admissible only for the purpose of impeaching such other person who was not a witness.—*Ib.* 59.

2. Instructions.

(a) Self-Defense.

Homicide; Self-Defense.—The belief of accused of imminent danger must be a reasonable belief produced from surrounding circumstances in order to enable him to rely on self-defense.—*Francis v. The State*, 39.

Same; Instructions.—A charge asserting that the danger need not be actual, but if the circumstances create in the mind of defendant a reasonable belief that he is in imminent danger of great bodily harm, or of losing his life, he may shoot his assailant to save his own life, omits essential elements of self-defense, and is properly refused.—*Ib.* 39.

Same.—A charge combining some elements which are sought to reduce a homicide to manslaughter, with other elements applicable to the theory of self-defense, is misleading and properly refused.—*Ib.* 39.

Same.—A charge that if defendant did not provoke the difficulty, and when he fired the fatal shot the circumstances were such as to create in his mind the belief that he was in danger of losing his life or of suffering great bodily harm, he must be acquitted, was properly refused for not predicating freedom from fault in bringing about the difficulty; the expression "did not provoke the difficulty" not being the equivalent of freedom from fault.—*Ib.* 39.

Same; Instructions; Burden of Proof.—The state is not bound to prove that deceased was free from fault in bringing on the fatal encounter, although the jury may believe that a state of facts existed which put upon the state the burden of showing that defendant was in fault.—*Davis v. The State*, 59.

Same.—Where there were only two alternative findings possible—that accused killed deceased before the latter made any demonstration, or that deceased made an assault upon defendant with a deadly weapon—Instructions on the right of a party to act upon the reasonable appearance of danger, were properly refused.—*Ib.* 59.

Same; Self-Defense.—Ordinarily, a person attacked with murderous intent is not bound to retreat, unless he can do so without increasing his peril, but that rule does not obtain where he provokes the difficulty; hence, where defendant claims that he killed in self-defense, a charge on the duty to retreat which omits the qualification that he could do so without increasing his peril was properly refused.—*Ib.* 59.

Same.—Where a defendant fired the fatal shot as a result in part of sudden passion aroused by a blow, though he entertained malice, the fact of the sudden passion did not reduce the offense to manslaughter.—*Ib.* 59.

Same.—Where the state asserted that defendant went to the store for the purpose of provoking the difficulty, and there killed deceased, the refusal of an instruction that defendant had the right, under the law, to go to the store, was not error.—*Ib.* 59.

Homicide; Self-Defense.—Where a defendant was in actual imminent peril of life, or of suffering grievous bodily harm, when he shot deceased, and the other conditions requisite to the exercise of the right of self-defense were present, an honest belief on the part of defendant in his peril was immaterial, and an inquiry as to its existence will not be made, since the requirement of honest belief

HOMICIDE.—Continued.

is applicable only to reasonably apparent peril.—*O'Rear v. The State*, 71.

Same.—Where the circumstances attending the homicide were such as to justify defendant in a reasonable belief that he was in danger of death or great bodily harm, and that he could not retreat without increasing his peril, and he honestly believed such to be the case, he could shoot in self-defense, although as a matter of fact, he was not in actual danger, and a retreat would not have increased his peril, and the burden of showing that defendant was not free from fault in bringing on the difficulty is on the state.—*Ib.* 71.

3. Degree, etc.

Homicide; Degree; Jury Question.—Where there was evidence from which a rational mind could infer that defendant was guilty of murder in the first degree, it became a question for the jury to determine the degree of guilt, and not a question for the trial court.—*Pope v. The State*, 50.

HUSBAND AND WIFE.

1. Injury to Wife.

Husband and Wife; Injury to Wife; Recovery by Husband.—A husband deprived of the society and services of his wife on account of injury to her by the wrongful act or omission of another may recover compensatory damages therefor, but he cannot recover for the injury itself; hence, a complaint by the husband in such a case he need not itemize the particular injuries inflicted on the wife.—*B. R. L. & P. Co. v. Roach*, 306.

2. Mortgage by Wife as Surety.

Husband and Wife; Mortgage; Partial Validity.—Where part of the mortgage debt is the joint or several indebtedness of the wife, a mortgage executed by her is valid to the extent it secures the payment of her indebtedness.—*Bley, et al. v. Lewis*, 535.

Same; Separate Property.—A wife seeking to avoid a mortgage because securing a debt of the husband has the burden of showing that her relation is that of surety only to the indebtedness secured by the mortgage.—*Ib.* 535.

Same; Notice to Mortgagee.—Without regard to notice of the fact that the mortgage was given by the wife to secure the debt of the husband to the mortgagee, such mortgage given by the wife is invalid, and a charge that there is a presumption of law that the mortgagee knew that the wife signed as surety in such case, is erroneous.—*Ib.* 535.

INJUNCTION.

Injunction; Temporary; Dissolution.—Under section 4353, Code 1907, the rule is modified, and an injunction will not be dissolved necessarily merely because the answer denies the material averments of the bill.—*Kyser v. Hertzler*, 658.

Same.—The fact that a nuisance was dissolved in obedience to a temporary injunction should not be considered on a motion to dissolve such injunction.—*Ib.* 658.

INSANE PERSONS.

Insane Persons; Mortgage; Validity.—A mortgage by an insane person is absolutely void, and passes no title to the mortgagee.—*Harris v. Jones, et al.*, 633.

INSURANCE.

1. Accident.

Insurance; Accident; Intentional Act of Third Person.—Where a party had intelligence enough to understand the nature and consequences of his act, and the act was voluntary and resulted in physical injury to the person of the insured, such injury was the result of an intentional act within the policy limiting liability for injuries caused by the intentional act of another.—*Continental Cas. Co. v. Cunningham*, 159.

Same.—Where the policy limited liability where the injury resulted from the intentional act of a third person, and the evidence showed that the insured was shot by a third person undisputedly, and there was evidence that at the time such third person was drunk, and also evidence as to the degree of his drunkenness, the question of his capacity to do an intentional act was for the jury.—*Ib.* 159.

Same.—Where insured was shot by a third person who was fleeing from arrest and who shot at every one interfering with his flight, his act in shooting insured, a police officer attempting to prevent his flight, was an intentional act to kill insured, whether insured was known to such third person, or whether knowing him, such third person mistook him for someone else whom he intended to shoot, within the policy limiting liability for the intentional act of a third person.—*Ib.* 159.

2. Fire.

Insurance; Fire; Causes; Collapse of Building.—Where the fire insurance policy contained a clause that if the building shall fall, except as a result of fire, all insurance on the building and contents shall immediately cease, the owner of a stock of insured goods cannot recover thereon if the building fell from some other cause than fire, if none of the goods were injured by the fire before the collapse of the building, even though it caught fire before it fell.—*Ogburn-G. Gro. Co. v. Orient Ins. Co.*, 218.

INTOXICATING LIQUORS.

Intoxicating Liquors; Jury Trial; Statute; Presumption.—Where defendant wrote on his appearance bond, "I, Shell Fletcher, defendant in this case, prefer a jury, Sept. 8, 1913," the statement was a substantial compliance with the requirement of Acts 1909, p. 63, for a demand for a jury; it being presumed that the sheriff duly returned the bond to the clerk as required by section 6291, Code 1907, so that the demand for a jury was filed with the bond.—*Fletcher v. The State*, 1.

Intoxicating Liquors; Prohibition; Statute.—The Carmichael and Fuller Bills cover, within the state, all liquors which no person can lawfully have in his possession, and since the passage of the Webb Law, interstate traffic in such intoxicating liquors for unlawful use in the state is prohibited.—*Southern Ex. Co. v. The State*, 454.

Same; Regulation.—Under the Federal penal code, section 240, 35 Stat. 1137, a common carrier of interstate commerce is apprised of the character of the shipment when intoxicating liquor is received by it, and under the Webb Law, before it delivers the liquor to the consignee in the state, it should inform itself of the purpose of the consignee, and where it has liquor in its possession for delivery to a person intending to use it in violation of a state law, or actually delivering it in the state to such person, such carrier is presumptively guilty of a violation of the law of the state.—*Ib.* 454.

INTOXICATING LIQUORS—*Continued.*

Same; Violation; Injunction; Bill.—A bill by the state against an interstate carrier to enjoin the maintenance of a liquor nuisance which alleges that the carrier has warehouses where goods received are stored to await delivery to the consignee; that "prohibited liquors" are received at the warehouses in large quantities, and at frequent intervals, for delivery to individuals for illegal purposes; that prohibited liquors are received by the carrier for distribution or delivery contrary to the laws of the state, and that it is maintaining a liquor nuisance, charges a violation of the law by the carrier authorizing injunctive relief; the words "prohibited liquors" meaning intoxicating liquors, which under the Acts of 1907, p. 71, Special Session, the carrier has not the legal right to have in its possession.—*Ib.* 454.

Same.—Where a carrier of interstate commerce, in good faith, and after proper investigation, delivers liquor to a consignee without knowledge that the same is intended by the consignee for illegal use in the state, the carrier does not violate any of the laws of the state.—*Ib.* 454.

Same; Nuisance; Injunction.—To justify a departure from the rule that an injunction should be dissolved on a sworn answer denying the averments of the bill, it must be apparent that irreparable mischief will follow, or some circumstance peculiar in its nature must exist; where a carrier, respondent in a suit, to enjoin it from maintaining a liquor nuisance, alleges under oath that it has not in any way acted in violation of any laws of the state by engaging in interstate commerce in liquors, a preliminary injunction restraining it should be dissolved.—*Ib.* 454.

JUDGES.

1. Official Bonds Judge of Probate.

Judges; Official Bond; Failure to Collect Tax; Action.—The county could sue the probate judge who failed to collect the tax on the mortgage as required by subdivision 7, section 2082, Code 1907, and also the sureties on his official bond for its share of such tax. (Sections 2473 and 5475, Code 1907); since, although the tax was levied by the state, it is levied for the benefit of the county in the proportion of one-third thereof.—*Hudgins v. Pickens Co.*, 141.

JUDGMENTS.

1. Opening or Vacating.

Judgment; Opening or Vacating; Insufficiency of Complaint.—If any count of the complaint stated a cause of action a motion to vacate a judgment on the ground that the complaint stated no cause of action, is properly overruled.—*Hudgins v. Pickens Co.*, 141.

Judgment; Opening Default; Motion; Taking Under Advisement.—Under practice acts 1888-9, p. 797, where a motion to open a default judgment was made and heard within thirty days after the entry of the judgment, an entry of an order by the court taking the motion under advisement continued the motion without a formal order of continuance, and authorized the court to determine the motion after the thirty days had expired; there being no reason why the common law order of curia advisari vult may not be employed in the case of motions as well as in respect of causes, since the setting aside of the judgment by default must be done by a formal judgment.—*Ex parte Doak*, 406.

Same; Affidavits on the Merits.—Where the application was by a city to open a default judgment, an affidavit by the attorney of record for the city that he had caused a full investigation of plain-

JUDGMENT—Continued.

tiff's claim to be made, and that from such examination he was of the opinion that the city had a meritorious defense, and was not liable to plaintiff, was a substantial compliance with the requirements of Acts 1888-9, p. 797, governing proceedings in the circuit court of Jefferson county.—*Ib.* 406.

Same.—Circuit Court Rule 11, as to proceedings in the Circuit Court of Jefferson County is superseded by the provisions of Acts 1888-9, p. 797, so far as specifying what the affidavit on an application to reopen a default judgment in such court, shall contain.—*Ib.* 406.

Same; Discretion of Court.—It is within the sound discretion of the circuit court to set aside a default judgment, when satisfied that an injustice has been done, or that it has been inadvertently or improvidently entered, and its decision thereon is not revisable on appeal unless abuse is shown.—*Ib.* 406.

Same; Hearing and Determination.—On an application to open a default judgment, it is the duty of the court to consider all the circumstances so that the discretionary powers reposed in it may be wisely exercised, and although it deems it unnecessary to enter upon an inquiry involving the impeachment of the return of the sheriff, it was proper for the court to consider whether in fact there had been service upon the commissioner of the defendant city, as the return recited, so that such discretion might be soundly exercised.—*Ib.* 406.

2. Default and Incidents.

Judgment; Default; Correction.—Any error in rendering a default judgment against defendant who had not been properly served, may be corrected in the trial court on motion, or in the Supreme Court without remanding the cause if the judgment can be otherwise affirmed, at the cost of appellant.—*Long v. Guin*, 196.

Same; Final.—A judgment by default against defendants who do not appear is in its nature interlocutory to await disposition as to the other defendant, and is made final when judgment is rendered against the other defendants.—*Ib.* 196.

3. Equitable Relief Against.

Judgment; Equitable Relief; Newly Discovered Evidence.—In the absence of fraud in the act of obtaining a judgment at law, equity will not interfere, unless a defense at law was prevented because of accident or fraud, or act of the successful party, unmixed with fraud or negligence of the other party.—*DeSoto C. M. & D. Co. v. Hill*, 667.

Same; Fraud.—Equity will not enjoin the enforcement of a judgment at law merely because of newly discovered evidence, since the reason for the exercise of such jurisdiction has ceased to exist, the courts of law now having ample jurisdiction to grant relief.—*Ib.* 667.

Same.—Equity will not enjoin a judgment at the suit of the unsuccessful party on the grounds of newly discovered testimony in the absence of fraud of the adverse party in obtaining the judgment, where there is no excuse for the failure to procure such evidence for the trial.—*Ib.* 667.

Same.—Equity will not grant relief against a judgment at law as obtained by fraud unless the fraud was practiced in the procurement of the judgment, and in the proceedings by which it was obtained, and not merely where the fraud is antecedent to the judg-

JUDGMENT—*Continued.*

ment, as where material testimony upon which it was rendered was false.—*Ib.* 667.

Same; Pleadings.—The allegations of a bill to enjoin a judgment at law must be positive, specific and explicit.—*Ib.* 667.

JURY AND JURORS.

See Intoxicating Liquors; Equity, § 3.

1. Competency and Qualifications.

Jury; Competency; Rejection by Court.—Under Acts 1909, p. 305, the court cannot properly decline to place upon the lists the names of persons appearing as a part of the venire as to whom no statutory ground of disqualification exists, and who are not excused for some reason personal to the juror, such as sickness.—*Spicer v. The State*, 9.

Same.—It was not error for the court to excuse of its own motion jurors who were opposed to capital punishment, or who had a fixed opinion.—*Ib.* 9.

Same; Qualification; Reading English.—Inability to read the English language does not disqualify the juror who is possessed of all the other qualifications prescribed, and is a freeholder or householder (Acts 1909, p. 305.)—*Ib.* 9.

Jury; Competency.—While the jury law (Acts 1909, p. 305), supersedes former laws for the organization of jurors and prescribes the qualifications of persons whose names are to be placed on the jury roll and in the jury box, it does not declare who are competent for the trial of a particular case, nor does it change the pre-existing law on that subject.—*O'Rear v. The State*, 71.

Same.—A juror who will not inflict the death penalty on any evidence, or on circumstantial evidence alone, is not a qualified juror to sit in a case where the charge is murder in the first degree, and the court may reject such juror on its own motion.—*Ib.* 71.

Same; Qualification; Statutory Provision.—The jury law of 1909 abrogates the former system of challenging jurors by the parties, and the trial judge must determine not only whether the veniremen possess the general qualifications, but whether they are competent for the particular case, and it is immaterial whether the court rejects an unfit veniremen on its own motion, or on the suggestion of another, or that incompetent jurors are not discovered by the preliminary inquiries before the lists are made up, provided they are discovered at any time before the striking is begun, in which case, the court should strike them of its own motion.—*Ib.* 71.

2. Objection to Venire.

(a) Waiver.

Jury; Objections; Waiver.—Where the first motion of defendant to quash the venire was not sufficient under the statute, errors in the selection of the special venire were waived, and a defendant cannot, by an objection to being put on trial and a motion to quash on the ground that the court, after fixing by its order the number of the special venire, erred in excusing some of them, thus reducing the number of jurors to a less number than fixed by the order, not made until after the selection of the jury, take advantage of the error.—*Tennison v. The State*, 90.

Jury; Special Venire; Waiver.—A defendant may waive a special venire in a capital case under the provisions of section 7264, Code 1907.—*Washington v. The State*, 101.

JURY AND JURORS.—*Continued.*

Same; Empanelling; Waiver.—The Acts of 1909, p. 305, do not effect or repeal the subject of waiver by a defendant in a capital case of a special venire as authorized by section 7284, Code 1907.—*Ib.* 101.

JUSTICES OF THE PEACE.

1. Pleadings in.

Justice of the Peace; Pleadings.—In the justice court, no particularity is required as to pleading, and the action of the court in overruling demurrers to a complaint containing the common count for balance due for goods sold; account; interest due on account, and for error as to invoice, was not erroneous.—*Baker v. Britt-C. Shoe Co.*, 225.

LANDLORD AND TENANT.

Landlord and Tenant; Holding Over; Rent.—Where a tenant holds over with the consent of his landlord, he is liable for the same rent reserved in the lease for the preceding year, not for a reasonable rent, and an ineffectual intervening negotiation for a sale makes no change.—*Walker v. Gunnels*, 206.

Same; Recoupment; Improvements.—Where the tenant sought to recoup for improvements, evidence for the tenant that the ditching he did was reasonably worth \$25, but not showing that that amount was reasonable, was not admissible.—*Ib.* 206.

Same.—The fact that the tenant had placed thirty loads of stable fertilizer on the land in the ordinary course of cultivation, was not an improvement for which he could claim a set off.—*Ib.* 206.

Landlord and Tenant; Removal of Structure; Liability.—Where the owner of practically all the stock of a traction company, which held as sub-lessee, an amusement park, directed the manager to remove fixtures, but not to remove or disturb any of the buildings, and did not give any directions for the removal of a track in the park, he was not liable for the act of the manager in removing or disturbing the buildings, and in removing the tracks, and his mere knowledge of the removal of the track was not sufficient to render him liable personally.—*Walker v. Tillis*, 313.

Landlord and Tenant; Rent; Attachment; Continuance.—Under sections 2924, 2961, Code 1907, made applicable to attachments by a landlord by section 2751, Code 1907, the court properly granted the continuance in a cause wherein an attachment was sued out by a landlord to enforce his lien for rent not yet due when the cause was continued.—*Ex parte Seals P. & O. Co.*, 443.

LEASE.

See Fixtures; Landlord and Tenant.

LIBEL AND SLANDER.

Libel and Slander; Pleading; Amendment.—It was competent for plaintiff to amend his complaint so as to allege his business or profession by way of inducement.—*Age-Herald Pub. Co. v. Waterman*, 272.

Same; Colloquium.—Where the words set out in the complaint for libel are not actionable per se, the complaint must allege facts to show the sense in which the language was used, etc.—*Ib.* 272.

Same.—Matters of inducement or colloquium averred by way of introduction must be facts, and not mere statements, arguments or conclusions, showing that the words in question are actionable.—*Ib.* 272.

LIBEL AND SLANDER—*Continued.*

Same; Innuendo.—In an action for libel the office of the innuendo is to explain the subject matter, and if the language averred to have been used does not itself constitute a libel, no words contained in the innuendo can make it actionable.—*Ib.* 272.

Same.—In a complaint for libel, an innuendo means the same as "id est," "scilicet," or "aforesaid," being merely explanatory of the subject matter sufficiently expressed before.—*Ib.* 272.

Same.—In an action for libel, facts alleged as inducements or colloquia are traversable, and must be proven, while the innuendo is not traversable, and hence, need not be proven.—*Ib.* 272.

Same; Complaint; Words Actionable.—The complaint examined and held to state a cause of action.—*Ib.* 272.

Same; By Others.—Every repetition of a slander, or the publication thereof by a newspaper is a republication, rendering each person so repeating or republishing liable, as well as the initial one.—*Ib.* 272.

Same.—The initial slanderer or libeller is not responsible in an action of slander or libel, for such repetitions and republications of the slander and libel.—*Ib.* 272.

Same.—It was error to instruct the jury that under the law of Alabama, this defendant is responsible for the publication of any libel which may result in actionable injury, as such instruction authorizes a recovery for publications made by other newspapers.—*Ib.* 272.

Same; Evidence.—Evidence that the alleged libelous article was republished by other newspapers, was not admissible, nor was it rendered so because the reporter who reported for defendant also reported for the other papers.—*Ib.* 272.

Same.—A repetition by a defendant of the libelous words is admissible as evidence of malice, and in aggravation of damages.—*Ib.* 272.

Same; Instructions.—Where there were special pleas alleging that the matter was privileged, and there was evidence to support them, it was error to instruct the jury to find for plaintiff if the jury were reasonably satisfied that plaintiff had been injured in the manner averred in the complaint.—*Ib.* 272.

LIMITATION OF ACTIONS.

Limitation of Action; Pleading; Amendment.—An amendment to the complaint setting up a republication of the libelous action by other newspapers, and charging that they were induced or caused by defendant, states a different cause of action, and being filed more than a year after the publication, was expressly barred by section 4840, Code 1907.—*Age-Herald Pub. Co. v. Waterman.* 272.

MANDAMUS.

Mandamus; Grounds; Control of Discretion.—Except in extraordinary cases for gross abuse of discretion the exercise of the trial court's discretion in granting a continuance will not be controlled by mandamus.—*Ex parte Seals P. & O. Co.*, 443.

MASTER AND SERVANT.

1. Employers Liability.

Master and Servant; Injury to Servant; Employer's Liability Acts.—Where the employer furnished a superintendent to overlook the progress of the work, and no complaint of his competency was made, the common law duty of the master ended, if it be conceded that the complications and dangers were such as to require a super-

MASTER AND SERVANT—*Continued.*

intendent, and the master was not liable for the negligence of the superintendent except as imposed by the Employer's Liability Statutes.—*Langhorne, et al. v. Stimington*, 337.

Same; Obligation of Master.—It is the duty of an employer to exercise due care to provide a reasonably safe place for employees to work, having regard to the kind of work, and where this duty is delegated to an employee, such employee represents the employer, who is liable for the negligence of the employee in discharging the duty; but the employer's duty of maintaining the safety of the place of work may be discharged by committing its performance to employees carefully selected for competency and fitness.—*Ib.* 337.

Same.—Where the prosecution of the work itself makes the place and creates its dangers, the rule requiring the employer to provide his employees with a safe place to work, is without application.—*Ib.* 337.

Same; Negligence of Superintendent.—Where a superintendent in charge of excavating the earth from a cut was negligent in pushing forward a steam shovel to a point where those engaged in its operation were exposed to danger from defectively finished walls of the cut, such negligence of the superintendent was not negligence in providing a safe place for the employee in which to do his work, and the employer's liability, if any, was under the Employer's Liability Act.—*Ib.* 337.

Same; Employer's Liability Act.—While the Federal Employer's Liability Act enlarges the liability of an employer by curtailing the fellow servant doctrine, yet an employer need not do for his employee that which the latter may do for himself for his protection, and where superintendence is entrusted to an employee, who, while acting within the scope of his authority, falls in due care for his subordinate co-employees, a recovery may be had under the statute.—*Ib.* 337.

Same; Pleading.—To state a cause of action under the Employer's Liability Act for negligence of superintendence, the complaint must set out the fact of superintendence and the particulars wherein there has been a failure to exercise due care.—*Ib.* 337.

Master and Servant; Injury to Servant; Notice of Defect.—Under subdivision 1, section 3910, Code 1907, a master is not liable for injuries to an experienced engineer from the unexpected starting of a stationary engine caused by a leak in a valve in the interior of the engine, where the existence of a defect was not previously known to the master, and there was nothing to charge him with knowledge thereof, although the master had had notice of other defects, and had instructed an expert engineer to remedy same.—*W. R. Flowers L. Co. v. Hutchins*, 361.

Same.—A request by an engineer to his employer to have a stationary engine overhauled for defects discoverable while the engine was not in use, was not notice of a latent defect discoverable only when the engine was running, within the provisions of subdivision 1, section 3910, Code 1907, so as to render the employer liable for subsequent injuries to the engineer from such defects which were first discovered at the time of the accident, and while the engine was running.—*Ib.* 361.

Same; Defective Machinery; Burden of Proof.—Where the action was under subdivision 1, section 3910, Code 1907, the burden was on plaintiff to prove the existence of the defect, and that it arose from or was not discovered or remedied owing to the negligence of defendant or someone in his employ, and that such defect was the cause of the injury.—*Ib.* 361.

MASTER AND SERVANT.—*Continued.*

Same.—Where the action was by an engineer for injuries from the sudden starting of a stationary engine due to a leak in the valve on the interior of the engine, the burden was on plaintiff to show that there was something in the manner in which the engine stopped just prior to the accident which showed a defect in the valve which a reasonable inspection could have detected.—*Ib.* 361.

2. Common Law Liability.

Same; Common Law Liability.—Where the place where an employee was working when injured was in a reasonably safe condition when he began work, but became unsafe thereafter, the employer was not liable at common law for a failure to furnish a reasonably safe place in which to work.—*Langhorne v. Simington*, 337.

MILITIA.

Militia; Constitutional Provisions.—It is competent for the legislature to prescribe the services to be rendered by the state militia.—*Betty v. The State*, 211.

Same; Pay for Service.—Section 278, Constitution 1901, sections 7396, 1399-7402, Code 1907, and Acts 1911, p. 670, considered, and it is held that an aide de camp on the Governor's staff had no duties apart from active service, under the Commander-in-Chief, and that travel by the aide when ordered to accompany the governor to the inauguration at Washington, was not compulsory, or in active service, and hence, that he was not entitled to any pay or allowance therefor.—*Ib.* 211.

MORTGAGES.

See Husband and Wife, § 2.

1. Crops (Validity.)

Mortgages; Validity; Crops.—Where, at the time of the execution of the mortgages, the mortgagor has no valid lease of the land where the crop was to be grown, but was merely negotiating for the lease, the mortgage upon the crops to be grown was not valid as the crop at that time had no potential existence.—*Sellers & Orum Co. v. Hardaway*, 388.

2. Deeds as.

Mortgage; Deed as.—The circumstances and contract considered and it is held that the transactions did not create a mortgage because the original purchaser was not indebted to the third person named in the deed.—*Stollenwerck v. Marks & Gayle*, 587.

Same.—Where there is no debt due from the grantor to the grantee in a deed absolute in form, the deed is not a mortgage.—*Ib.* 587.

Same; What Are.—In equity, a mortgage is a hypothecation or pledge of property as security for debt, and its effect is to leave the mortgagor personally liable for the debt, if, on foreclosure, the property fails to yield a sufficient sum to pay the debt in full.—*Ib.* 587.

Same; Debt.—The word "debt" in the definition of a mortgage means a duty or obligation to pay, for the enforcement of which an action will lie.—*Ib.* 587.

3. Mortgagee in Possession.

Mortgages; In Possession; Accounting.—The right of a mortgagor to hold the mortgagee in possession to an accounting for rents and

MORTGAGES—Continued.

profits or waste, can only be enforced in equity although the rents are alleged to have been sufficient to satisfy the mortgage debt; the mortgagee being the legal owner of the estate, and his accountability for rents, etc., only an incident to the right to redeem in equity.—*Harris v. Jones*, 633.

Same; Bill to Redeem.—The bill examined and held not to be a bill to set aside the second mortgage, but to redeem and to compel an accounting by the mortgagee in possession, and therefore, not demurrable.—*Ib.* 633.

MUNICIPAL CORPORATIONS.

For effect of conviction by recorder, see Former Jeopardy.

1. Ordinances.

Municipal Corporation; Ordinances; Presumption.—An ordinance assuming to exercise a power within the granted powers of the municipality not void on its face is presumed to be reasonable and valid until the contrary is shown.—*Briggs v. B. R. L. & P. Co.*, 262.

Same; Reasonableness.—Whether an ordinance of a municipality is unreasonable is a question to be determined by the court, and not for the jury.—*Ib.* 262.

Same; Validity.—The unreasonableness of an ordinance must be clearly shown before the courts will declare such ordinance void for unreasonableness.—*Ib.* 262.

2. Suits Against—Joinder.

Parties; Objection.—Under section 1274, Code 1907, an objection that some person or corporation should have been joined with the city as a defendant, but had not been, should be presented by a motion for non-suit, and not by a demurrer.—*City of Bessemer v. Whaley*, 381.

Same; Waiver.—Where the city fails to move for a non-suit for want of a proper party defendant under section 1274, Code 1907, and pleads to the complaint instead, it waives its right to object to non-joinder by parties defendant.—*Ib.* 381.

3. Defective Sidewalks.

Municipal Corporation; Defective Sidewalk; Injury; Evidence.—Where the complaint alleges that the city officers failed in their duty relative to the sidewalks, city ordinances relating to such duties are admissible in evidence.—*City of Bessemer v. Whaley*, 381.

4. Annexation and Merger.

Municipal Corporations; Annexation and Merger; Effect on Pending Action.—Under section 1159, Code 1907, where pending a suit by the city of Elyton, that city became a part of the city of Birmingham, the court properly ordered on motion that the suit proceed in the name of the city of Birmingham, although ordinarily the rule is that where the entire interest of the sole complainant in a suit passes to another by assignment or otherwise, the assignee claiming by a title that may be litigated must seek relief by an original bill in the nature of a supplemental bill, or by bill of revivor.—*Rudolph v. City of Birmingham*, 620.

Same; Streets.—Where a city took a highway in territory incorporated into a city as it exists within law and fact at the time of such incorporation, its location in law and in fact was not affected by an encroachment thereon by an abutting owner.—*Ib.* 620.

NEGLIGENCE.

1. Proximate Cause.

Negligence; Proximate Cause.—A person guilty of negligence is responsible for all the consequences which a prudent, experienced man, acquainted with all the attendant circumstances, would have foreseen.—*Briggs v. B. R. L. & P. Co.*, 262.

Same.—Unless the evidence clearly shows that the negligence of defendant was not the proximate cause of the injury complained of that question is for the jury.—*Ib.* 262.

NEW TRIAL.

New Trial; Successful Party; Grounds.—Where a verdict was rendered for plaintiff, the only ground on which he could properly seek a motion for a new trial was that the verdict was inadequate.—*M. & O. R. R. Co. v. Brassell*, 349.

Same.—Under the facts in this case it was the province of the jury to determine whether plaintiff had sustained any substantial damages as the proximate result of the alleged wrong, and hence a verdict in his favor for nominal damages only should not be set aside by the court unless the amount allowed was so inadequate as to plainly indicate that the jury was actuated by passion, prejudice or other improper motive.—*Ib.* 349.

Appeal and Error; Review; Damages.—There being credible evidence and reasonable inferences therefrom upon which the jury might rest the amount awarded, both as to compensation and exemplary damages, the amount of the verdict did not show such passion or prejudice as to require the setting aside of the verdict.—*B. R. L. & P. Co. v. Nalls*, 352.

NUISANCE.

Nuisance; Private; What Constitutes.—Although a private stable per se is not a nuisance, it may become so by reason of the manner in which it is constructed, kept or used, or by reason of the location being improper or necessarily injurious to a neighbor.—*Kyser v. Hertzler*, 658.

Same.—A private stable emitting offensive odors, located about thirty feet from the front of plaintiff's residence, is a private nuisance which equity will abate.—*Ib.* 658.

Same; Abatement and Jurisdiction.—Section 718, Code 1907, confers a concurrent and cumulative, but not an adequate remedy, and does not affect the original jurisdiction of equity to abate nuisance.—*Ib.* 658.

OVERRULED CASES.

Jones v. State, 174 Ala. 53, by *Davis v. State*, 59.

Elmwood Cemetery Co. v. Tarrant, 170 Ala. 549, by *Ex parte State v. Lovejoy*, 401.

Cox v. M. & G. R. R. Co., 44 Ala. 611, by *De Soto Coal Mining & Dev. Co. v. Hill, et al.*, 669.

Waters v. Creagh, Ex. 4 Stewart & Porter, 410 by *De Soto Coal Min. & Dev. Co. v. Hill, et al.*, 669.

PAYMENT.

Payment; Evidence; Burden of Proof.—The administrator of a deceased attorney suing for services rendered by the attorney has the burden of proving that the services were rendered and that they had not been paid for in whole or in part.—*Winter v. Pollak*, 153.

Same; Jury Question.—Under the evidence in this case it was a question for the jury whether the services rendered by the attorney for which his administrator was suing had been paid.—*Ib.* 153.

PENSIONERS.

Pensions; Pensioners.—The widow of a pensioner who was drawing a pension under Acts 1911, p. 690, is a pensioner within section 27 thereof, authorizing the probate judge to collect the pension upon a compliance with the provision of the said Act.—*Purifoy v. Teasley*, 416.

PLEADING.

In particular actions or crimes, see that title; see Appeal and Error, § 1 (b).

1. Conclusions.

Pleadings; Complaint; Allegation; Conclusion.—Where the facts set out in a complaint contradict the general conclusion, in determining the sufficiency of the complaint the conclusion must yield to the facts alleged.—*L. & N. R. Co. v. National P. Bank*, 109.

2. Striking Pleas.

Pleading; Striking Plea.—It is proper to strike frivolous pleas on motion made to that end.—*Baker v. Britt-C. Shoe Co.*, 225.

3. Replications.

Pleading; Replication; Necessity.—Where the action was against a corporation for the breach of a contract, and the fact that, notwithstanding the alleged contract had not been reduced to writing, signed by its president and countersigned by its treasurer, its validity was thereafter recognized by a partial execution thereof, was admissible under the issues made by pleas of non est factum, and the general issue, replications to that effect were unnecessary; but the allowance of unnecessary replication was not reversible error.—*Buck Creek L. Co. v. Nelson*, 243.

4. Amendments.

Pleading; Amendment; Right.—An amendment which will not cure a fatal defect in a pleading will not be allowed; hence, a party seeking leave to amend must show that the proposed amendment will make such pleading good.—*Watters v. Lyons*, 525.

5. Construction.

Pleading; Construction.—Pleadings are no stronger than their weakest alternative averment, and will be so construed.—*Union Cemetery Co. v. Jackson*, 599.

QUIETING TITLE.

Quieting Title; Mortgage by Insane Persons; Legal Remedy.—A mortgage by an insane person being absolutely void, a bill to have the same removed as a cloud on title, is without equity as complainant has an adequate remedy at law by ejectment.—*Harris v. Jones*, 633.

RAILROADS.

1. Persons on Track.

Railroads; Persons on Track; Unlawful Speed.—Where the recovery was sought on the theory of discovered peril alone, the running of a train which ran down plaintiff's intestate at an unusual rate of speed, furnishes no basis for liability.—*Helms v. C. of Ga. Ry. Co.*, 393.

Same; Evidence.—Where it was sought to charge a railroad with negligence on the theory that it wantonly ran its train at an unusual rate of speed, evidence that a large percentage of the travellers use the railroad tracks as a highway, is not admissible for the pur-

RAILROADS—*Continued.*

pose of showing that the railroad company should have anticipated the presence of persons on the track; there being no showing as to the number of travellers in that vicinity.—*Ib.* 393.

Same; Wanton Negligence.—Where those in charge of a passenger train which ran down a trespasser were not guilty of simple negligence after discovering his position of peril, they could not be guilty of willful negligence after discovery of danger.—*Ib.* 393.

ROBBERY.

Robbery; Evidence.—Where a prosecutor testified that when within about three quarters of a mile of town he was robbed by defendant and five other negroes, it is competent for a witness to testify that he had seen defendant in town about two hours before the commission of the offense and that he was with a crowd at that time.—*Washington v. The State*, 101.

Same.—Where it was shown that the robbery was committed while it was raining, it was competent to show by a witness that he saw defendant about three hours after the robbery, and that his clothes were wet and his shoes muddy.—*Ib.* 101.

Same.—Where defendant had had ample time and opportunity since the crime and before his arrest to dispose of the gun and money, it was proper to exclude evidence that when defendant was arrested neither a gun nor money was on his person.—*Ib.* 101.

SALES.

1. Elements.

Sales; Construction; What Constitutes.—Where a seed company consigned seed to retail dealers under an agreement for the sale of the seed on commission with a return of the unsold seed when called for, to be taken back at the invoice price, and the amount due for the seed sold paid at that time, the transaction constituted a sale, the title passing to the dealers, and hence, defendant was not liable for the payment of taxes upon the seed; it further appearing that defendant did not fix the price of the seed, and the retailers were not required to account after each sale, but were only entitled to a deduction for the amount of the seed returned unsold.—*D. M. Ferry & Co. v. Hall*, 178.

2. Passing Title.

Sales; Passing Title; Order Notify.—Goods shipped with bill of lading attached, order notify, remain the property of the seller after they have reached the station of the buyer until the draft is paid which is attached to the bill of lading.—*Sessoms Gro. Co. v. Inter. S. F. Co.*, 232.

3. Delivery.

Sales; Delivery; Reasonable Time; Option.—Where time for delivery of goods sold is at the option of the buyer, he must exercise his right within a reasonable time, and the seller is entitled to a reasonable time to make delivery after notice.—*Brunner v. Mobile G. P. L. Co.*, 248.

Same; Pleading.—The pleadings considered, and it is held that the allegations that plaintiff demanded delivery of the lumber within a reasonable time was a mere conclusion and insufficient, and that the allegation was also defective for failure to allege that defendant failed to make delivery within a reasonable time after demand.—*Ib.* 248.

TRESPASS—Continued.

Trespass; Evidence; Possession.—The evidence examined and held not sufficient to show that plaintiff was in actual possession of certain unenclosed, swampy woodland at the time defendant cut timber therefrom.—*Ib.* 385.

TRIAL.

1. Inspecting Papers.

Trial; Inspection of Papers.—It was not error for the court to refuse to require the state's counsel to turn over to counsel for defendant a slip of paper in the possession of the state's counsel on which defendant had written his name, but which was not sought to be introduced in evidence.—*Spicer v. The State*, 9.

2. Objections to Evidence.

Trial; Objections to Evidence; Necessity.—Where defendant made no objection to evidence of the *res gestæ* of the offense of robbery against another, he could not complain of its admission on appeal.—*Washington v. The State*, 101.

Same; Reception of Evidence; Objections.—Where the objection to a question states no ground, such objection is properly overruled.—*McCray v. Sharpe*, 375.

3. Sufficiency of Evidence.

Trial; Sufficiency of Evidence; Objection; Form.—The sufficiency of plaintiff's evidence to make out a *prima facie* case after he has rested his case, can only be presented by a demurrer to the evidence, or by a request for the affirmative instruction for defendant, and not by motion to exclude all of plaintiff's evidence.—*McCray v. Sharpe*, 375.

4. Argument of Counsel.

Trial; Argument of Counsel.—Where the son of deceased had testified to facts showing that the company was free from liability for the death of his father, it was not error for counsel of the company to ask in his argument what the administrator was endeavoring to do, although the intimation was that he was attempting to recover a money judgment against the company; such being the obvious purpose of the administrator.—*Helms v. C. of Ga. Ry. Co.*, 393.

TROVER AND CONVERSION.

Trover; Demand; Necessity.—One who takes possession of chattels belonging to another, even under a bona fide belief of a right to do so, takes them wrongfully and is guilty of a conversion thereof, and no demand is necessary before suing in trover.—*Meador v. Evans*, 229.

VENDOR AND PURCHASER.

1. Rescission.

Vendor and Purchaser; Rescission; Time; Laches.—Laches is grounded upon the assertion of adverse rights and unreasonable delay, to the prejudice of the adverse party, and acquiescence involves actual or imputable knowledge; hence, a complainant is not guilty of laches where, within eight months after discovering a false representation in a sale of land, it filed its bill for a cancellation of the conveyance and a rescission of the contract of purchase, the respondents' position having in no way changed except that one of the respondents had died in the interim.—*Union Cemetery Co. v. Jackson*, 599.

WILLS.

Wills; Contest; Trial by Jury.—Where the validity of a will is contested under section 6207, Code 1907, the Chancellor must, on seasonable demand, by either party, as a matter of right submit issues of fact to a jury as required by section 6209, Code 1907, and the jury may be empaneled by him, or he may direct the issues to a court of law for trial by jury.—*Ex parte Colvert*, 650.

Same.—Where a jury was regularly demanded in a suit to contest the validity of the will, and the Chancellor directed a trial of the issues by a jury in the court of law, the chancery court may award a new trial upon application properly made to it.—*Ib.* 650.

Same.—Where the issue devisavit vel non is tried by a jury and the verdict is made the basis of a final decree of the chancery court, on an appeal from such decree, the court will consider any exceptions properly reserved by bill of exceptions during the trial by jury.—*Ib.* 650.

Wills; Estate Devised.—A devise of the net income to be derived from an undivided half of certain real estate to an orphanage, without limitation as to time, constitutes a devise of the fee of one-half of the property; a devise of the rents and profits of the land being the equivalent of a devise of the land.—*Scruggs v. Yancy*, 682.

WITNESSES.

1. Impeachment.

Witnesses; Impeachment; Predicate.—Before a witness can be impeached by showing contradictory statements made out of court, his attention must be called to the time and place at which he made them.—*Phillips v. The State*, 57.

Same.—Where the facts before the trial judge show that the witness knew the time and place where the contradictory statements were made, about which he was being interrogated, and show that he could not have been taken by surprise, but would be afforded ample opportunity to make any explanation desired, a sufficient predicate was laid for the admission of such statement, although the question asked did not fix the place.—*Ib.* 57.

2. Examination and Cross.

Witnesses; Cross-Examination; Extent.—Where the prosecutor testified that as he was driving in a wagon along a road the defendant and five other negroes, masked, and with weapons and threats, forced him to deliver up his money, the question on cross-examination: "Don't you know that in a case like that if none of them had masks on their faces, it is hard to identify anybody?" was properly excluded as being argumentative as to the identification testified to.—*Washington v. The State*, 101.

Witnesses; Examination; Competency.—A witness present with the deceased at the time he met his death on the track, who had testified to the circumstances surrounding the accident, was competent to testify that he had detailed to the jury circumstances of the casualty.—*Helms v. C. of Ga. Ry. Co.*, 393.



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